2017 Employment and Labor Law Institute

October 6, 2017

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

CLE Information

STATE BAR of NEW MEXICO
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CENTER FOR LEGAL EDUCATION

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The issues discussed herein are intended as illustrative of the types of issues which can arise in the course of representation and are not intended to address, nor do they address the broad range of substantive issues which could potentially arise in the scope of such representation.

The authors/speakers suggest that careful independent consideration, to include a review of more exhaustive reference sources, be undertaken in representation of a client regarding this subject, and therefore the practitioner should not solely rely upon these materials presented herein.

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Speaker Biographies

Anne Noel Occhialino is a Senior Appellate Attorney in the Equal Employment Opportunity Commission's Office of General Counsel. As an attorney in the Appellate Services section, she makes appeal recommendations in EEOC cases and amicus curiae recommendations in private and public sector cases. She represents the EEOC in the federal courts of appeals across the country, writing briefs and presenting oral argument. She recently served as an acting Assistant General Counsel, supervising a team of six attorneys. Ms. Occhialino has worked with the Solicitor General's office on cases before the Supreme Court where the EEOC was either a party or an amicus. In 2012, she performed a detail to the office of Commissioner Constance Barker. Also in 2012, Ms. Occhialino served as an adjunct professor of law for the University of New Mexico's inaugural "DC Semester Program." She previously taught seven semesters as an adjunct professor of Legal Writing and Research at the George Washington University Law School. Ms. Occhialino grew up in Albuquerque, New Mexico. She is a graduate of the Albuquerque Academy, Wesleyan University in Middletown, Connecticut, and the University of New Mexico School of Law. Following law school, she completed a two-year clerkship with the Honorable James A. Parker of the U.S. District Court for the District of New Mexico. After her clerkship, she was accepted into the EEOC's Honors Program and moved to Washington, DC. As part of that program, she completed a 2003 detail to the National Labor Relation Board's Contempt Litigation Branch.

Vanessa C. Kaczmarek is an associate at Modrall Sperling. Her practice is focused on tax, estate planning, closely-held company matters, employee compensation matters, and non-profit law. Vanessa graduated from Smith College cum laude with a degree in Economics. She received a law degree magna cum laude from Brooklyn Law School and an LL.M. in Taxation from New York University. Prior to her employment at Modrall Sperling, Vanessa was a tax associate at the New York offices of Clifford Chance US LLC.

RiskSense co-founder **Mark Fidel** is responsible for advocating and growing RiskSense in the State of New Mexico, where RiskSense was founded and remains headquartered. He is also responsible for corporate development, including all company contracts and third-party partnerships, ensuring alignment within the market. Fidel is also a licensed New Mexico attorney, and brings more than 14 years experience in law and litigation.

Fidel holds a Bachelor of Arts and Economics degree with a major in Finance from New Mexico State University. He earned an Executive Master of Business Administration from the University of New Mexico and his law degree from the University of Denver.

Stephen Curtice graduated first in his class from the University of New Mexico School of Law in 2001, where he was the Citations editor for the Natural Resources Journal, and where he received the Rudolph Schware Scholarship in Labor Law. After clerking for Justice Pamela Minzner of the New Mexico Supreme Court, he worked for a year in the Appellate Court branch of the National Labor Relations Board in Washington, D.C. Missing New Mexico, he returned to clerk for the Justice Edward L. Chávez of the New Mexico Supreme Court. Since that time, apart from a brief six-year detour into water law, he has worked for Youtz & Valdez, P.C., in Albuquerque, where he represents public and private sector labor unions and plaintiffs in wage and hour cases. In Spring of 2011 he taught the labor law class at UNM School of Law as an adjunct professor. He served on the Board of the Employment and Labor Law

Section of the State Bar, and was the President of that Section in 2015. In 2017, he was appointed to serve on the Rules of Civil Procedure for the District Courts Committee.

Theresa Parrish is a director and shareholder in the Albuquerque office of Rodey, Dickason, Sloan, Akin & Robb, P.A. She practices in the Litigation Department with an emphasis on employment law and litigation, complex and high risk litigation, commercial litigation, and personal injury litigation including catastrophic injuries. She has significant jury and non-jury trial experience. She also has extensive experience in resolving claims through alternative dispute resolution including mediation and arbitration. She practices in all state court judicial districts, and in federal court, and before all administrative agencies including the US Equal Employment Opportunity Commission and the NM Department of Workforce Solutions and its Human Rights Bureau. Ms. Parrish has been listed in *Best Lawyers in America* since 2011 for employment law-management, and litigation-labor and employment. She was named Albuquerque Employment Law-Management Lawyer of the Year-2013, and Albuquerque Litigation – Labor and Employment Lawyer of the Year-2017 by *Best Lawyers*. She has been recognized by *Southwest Super Lawyers* as one of the Top 25 Lawyers in New Mexico and has been listed in *Chambers & Partners--America's Leading Lawyers for Business* since 2006 as an employment specialist.

Victor P. Montoya is a Principal and Office Litigation Manager in the Albuquerque, New Mexico office of Jackson Lewis P.C. and is a Certified Employment and Labor Law Specialist by the New Mexico State Bar's Board of Legal Specialization. Mr. Montoya's practice focuses on advising employers and representing them in litigation regarding federal and state laws related to employment, unemployment, wage, disability, and civil rights issues, including Title VII of the Civil Rights Act, the ADA, the ADEA, the FLSA, the FMLA, USERRA, the New Mexico Human Rights Act, and the New Mexico Minimum Wage Act. Mr. Montoya advises employers regarding employment practices and policies, handbooks, hiring, terminations, trade secrets, and employment contracts. Mr. Montoya also practices alternative dispute resolution and received his mediator certification from the University of New Mexico, School of Law in 1999.

Mr. Montoya is on the Board of Directors of the New Mexico State Bar's Employment & Labor Law Section and is the Section's Past Chair for 2012. Mr. Montoya received his J.D. from the University of California, Davis School of Law in 1998, where he served as Managing Editor of the *U.C. Davis Law Review*. Mr. Montoya is named in both *Best Lawyers* and *Southwest Super Lawyers*.

William D. Slease is Chief Disciplinary Counsel for the New Mexico Supreme Court Disciplinary Board. In addition to his duties as Chief Disciplinary Counsel, he serves as an adjunct professor at the University of New Mexico School of Law where he has taught ethics, trial practice skills, and employment law. He also chairs the Supreme Court of the State of New Mexico's Proactive Attorney Regulation Committee, the Court's Lawyer's Succession and Transition Committee and serves on the State Bar of New Mexico Professionalism Commission which is responsible for operating and administering the "Bridge the Gap: Transitioning Into the Profession Program" for new lawyers in New Mexico. He is a member and the 2017-18 Immediate-Past President of the National Organization of Bar Counsel.

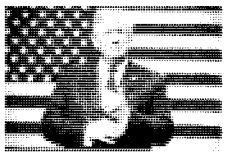
2017 EEOC Update

EEOC & FEDERAL LAW UPDATE

Friday, October 6, 2017

What's new at the Commission?

- New Chair?
- New Commissioners?
- New course?



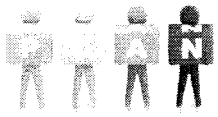
New policy, new priorities

- Regulations, guidance, litigation, appeals, amicus

Department of Justice

- Civil Rights Department
- New direction for them?

Strategic Enforcement Plan FY2017-21



SEP PRIORITIES

- Eliminating Barriers in Recruitment and Hiring
- Protecting Vulnerable Workers (Immigrant and Migrant Workers, and Underserved Communities)
- Addressing Selected Emerging/Developing Issues
- Ensuring Equal Pay Protections
- Preserving Access to the Legal System
- Preventing Systemic Harassment

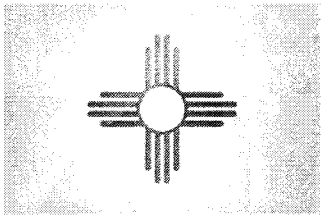
NATIONWIDE CHARGES

- How many in FY 2016?

- Race, national origin, sex, disability, age, religion, retaliation, EPA, GINA
- What is the # 1 complaint we receive?

EEOC Charges in New Mexico

- What's happening at home?



920 Charges

- Race 20%
- Sex 33%
- National Origin 1.6%
- Religion 3.4%
- Color 2.8%
- Retaliation 49%
- Age 22%
- Disability 32%
- EPA 2.4%

EEOC'S DIGITAL CHARGE SYSTEM

- Is EEOC going digital?

INTAKE OF CHARGES

- EEOC Assessment System → intake questionnaire with boxes

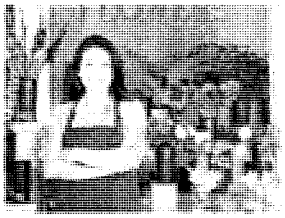
- EEOC Inquiry System → interview and then charge

EEOC litigation

- FY2016 – 114 lawsuits
- FY2006 – 403 lawsuits

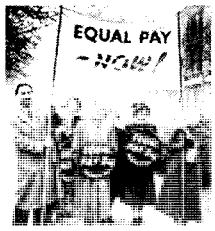
Small Businesses

- EEOC's Web Site has an entire "Resource Center"



Pay Data Collection/EEO-1

- Equal Pay Act
- EEO-1 changes
- OMB stay



Retaliation Guidance

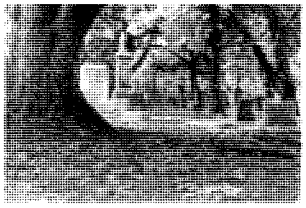
- August 2016 Guidance
- Your # 1 problem as an employer!

Participation & Opposition

- Participate = made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII
- Opposition = protected from retaliation for opposing any practice made unlawful under the EEO laws
  - Must be reasonable in opposition
  - Must have reasonable, good faith belief conduct is unlawful

EEOC v. Lincoln Cemetery

- Administrative assistant since 1983
- Fired right after talking to EEOC

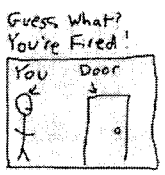


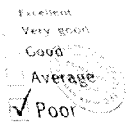
IS THIS "OPPOSITION"?

- Female employee complains when a less qualified man is selected for promotion.
- Same, but the position requires a CPA license, which she lacks.
- Employee is interviewed during internal investigation of someone else's complaint of sexual harassment and offers corroborating testimony.
- Employee asks for an accommodation to permit her to wear a headscarf.

Materially Adverse Actions

- Broad standard





HARASSMENT GUIDANCE

- Published proposed enforcement guidance
- Comments through March 2017

Feedback/Comments

- 120 Comments
- sexual orientation/transgender
- Joint Employer
- Customer Harassment

National Origin Guidance

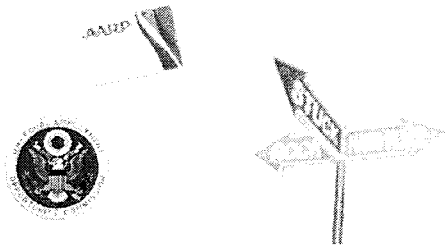
- November 2016
- Addresses citizenship, English-only policies, harassment, accent and fluency

Wellness Plans/ADA/GINA

- Regulations, Q/A, Small Business Fact Sheet, Webinar (1/1/2017)
- Must be "voluntary"
  - May not *require* participation
  - May not *deny insurance*
  - May not *retaliate*
- Incentives? = 30%

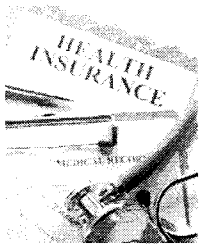
IS THE 30% RULE VALID??

- Judge Bates doesn't think so:



EEOC v. Flambeau

- Seventh Circuit ruling – kick the can down the road!



LGBT – STILL A HOT ISSUE

- How many states have LGBT employment laws?
- Does New Mexico?

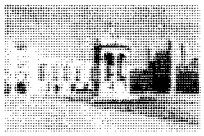
Is LGBT discrimination a real problem?

- FY2013 – 808
- FY2014 – 1,100
- FY2015 – 1,412
- FY2016 – 1,768 (3.4% cause)

Does "because of . . . sex" prohibition sexual orientation discrimination?

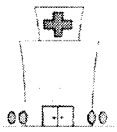
Yes!

- *Hively v. Ivy Tech Community College*



No!

- 11th Circuit in *Evans v. Georgia Regional Hospital*

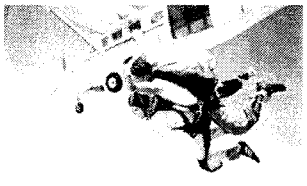


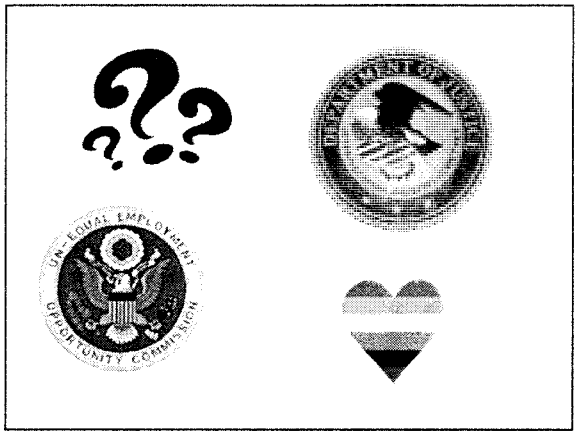
What does 10th Circuit say?

- No
- *Medina v. Income Support Division*

SECOND CIRCUIT

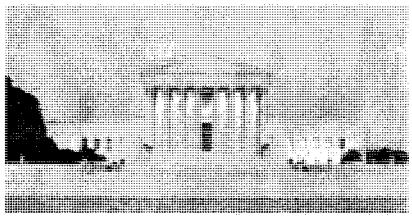
- *Zarda v. Altitude Express*





SUPREME COURT?

- *Evans? Zarda?*



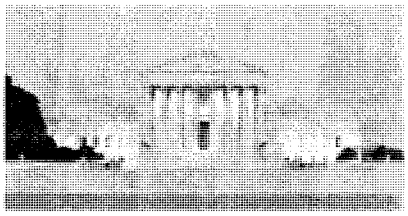
EEOC v. Harris Funeral Homes

- Title VII discharge

- Is the Religious Freedom Restoration Act a defense?

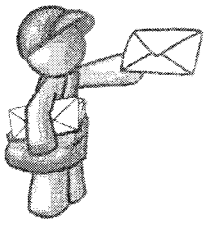
SUPREME COURT CASES

- What was decided? What will be decided?



MCCLANE CO. V. EEOC

- What is the standard of review in a subpoena enforcement action?



Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Does Colorado's public accommodations law violate the First Amendment by requiring Jack Phillips to create wedding cakes for same-sex weddings, which violates his religious beliefs?

ADEA – must state employers have 20 employees?

- *Guido v. Mount Lemmon Fire District*
- 29 U.S.C. 630(b) says an "employer" "has twenty or more employees" and that "the term also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision"

TENTH CIRCUIT CASES

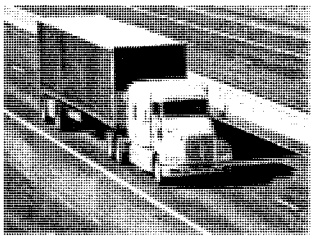
- *Hansen v. Skywest*
- *Morgan/300 days*
- Retaliation/fired

EEOC v. TriCore Reference Laboratories

- Pregnant worker with RA; needs to sit 75% of time
- She can apply to another position
- EEOC seeks to broaden its investigation

Jones v. Needham Trucking

- Exhaustion of administrative remedies
- Sexual harassment v. "quid pro quo"



Complaint: Sexual harassment and wrongfully terminated for rejecting "unwanted sexual advances"

Charge:

"During my employment I was subjected to sexual remarks by owner, Julie Needham. I complained to General Manager, Jonathan Needham and Stephanie Needham about the sexual harassment. Nothing was done. On or about November 3, 2014, Julie Needham terminated my employment."

THANKS!

- Annenoel.Occhialino@eeoc.gov

The end

EEOC & Federal Law Update

Anne Noel Occhialino

Friday, October 6, 2017

EEOC Materials:

National Origin

- Information and 2016 enforcement guidance https://www.eeoc.gov/laws/types/nationalorigin.cfm

Harassment

- EEOC's "*Proposed* Enforcement Guidance on Unlawful Harassment" https://www.regulations.gov/docket?D=EEOC-2016-0009 (comment period has ended)

Wellness Rules (ADA/GINA)

- Sample Wellness Notice for Employers to Use https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm
- Q&A on Final Wellness Rules and GINA (explaining background of rules and summarizing) https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm
- Final Wellness Rules under GINA are at 29 C.F.R. 1635, https://www.federalregister.gov/documents/2016/05/17/2016-11557/genetic-information-nondiscrimination-act
- Q&A on Final Wellness Rules and ADA https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm
- Final Wellness Rules under ADA are at 29 C.F.R. 1630, https://www.federalregister.gov/documents/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act

Small Business Resource Center
https://www.eeoc.gov/employers/smallbusiness/index.cfm

Supreme Court Cases

- *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159 (2017) – Subpoenas are reviewed for abuse of discretion (not de novo)

- *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S.) – The owner of Masterpiece Cakeshop objected, on religious grounds, to making a wedding cake for a same-sex couple. The Colorado Civil Rights Commission said that violated question Colorado's public accommodations law, which prohibits sexual orientation discrimination. The question is whether applying Colorado's law violates the owner's rights under the First Amendment's Free Speech and Free Exercise Clauses? (The petitioner's brief was filed; the respondent's brief is due October 23)

- *Guido v. Mount Lemmon Fire District*, 859 F.3d 1168 (9th Cir. 2017) – Disagreeing with the Tenth Circuit and three other circuits to hold that the 20-employee minimum requirement for an employer under the ADEA does *not* apply to political subdivisions of a state. Employer intends to file certiorari petition

Tenth Circuit Cases

- *Medina v. Income Support Division*, 413 F.3d 1131, 1135 (10th Cir. 2005)—Sexual orientation discrimination does not violate Title VII

- *Hansen v. Skywest Airlines*, 844 F.3d 914 (10th Cir. 2016) – Title VII sex-based hostile work environment case, retaliation; acts occurring more than 300 days before the charge should be considered as part of the hostile work environment

- *Hiatt v. Colorado Seminary*, 858 F.3d 1307 (10th Cir. 2017) – Title VII sex discrimination and retaliation case; affirms summary judgment for the employer

- *EEOC v. TriCore Reference Laboratories*, 849 F.3d 929 (10th Cir. 2017) – Affirming the district court's refusal to enforce the EEOC's subpoena seeking disability and pregnancy information based on a single charge

- *Depaula v. Easter Seals El Mirador*, 859 F.3d 957 (10th Cir. 2017) – Affirms summary judgment for employer in ADEA and Title VII case where plaintiff was fired

Title VII/Sexual Orientation/Transgender Cases

- *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir.) — The en banc argument was 9/26/17. The question was whether the court should overturn its precedent to hold that sexual orientation discrimination violates Title VII

- *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc) – First circuit to hold that sexual orientation discrimination violates Title VII

- *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), *petition for cert. filed*, No. 17-370 (Sept. 7, 2017) – Adhering to circuit precedent holding that sexual orientation discrimination does not violate the statute (with a robust dissent)

- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (August 18, 2016), *appeal docketed*, No. 16-2424 (6th Cir. 2016) – Is discrimination based on transgender status and/or transitioning "because of . . . sex" under Title VII? Did the court err in ruling that the Religious Freedom Restoration Act (RFRA) provided a defense to the Funeral Homes' termination of a transgender woman, based on the owner's Christian belief that sex is immutable and God-given?

NOTES

Tax Issues for Employment Releases

TAX ISSUES FOR EMPLOYMENT RELEASES AND SETTLEMENT AGREEMENTS

October 2017

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TAX ISSUES FOR EMPLOYMENT RELEASES AND SETTLEMENT AGREEMENTS

Attorneys negotiating employment releases and settlement agreements should understand the basic tax consequences of those agreements, or at least know when to consult with a tax practitioner. The last thing attorneys want is to be taken by surprise by the tax effects of the deal they struck. This paper begins with a description of relevant general tax principles, followed by discussions of employment releases, and then settlement agreements. Finally, it provides information regarding the special reporting rules for payments made to attorneys. This is a simplified summary of key tax rules relevant to employment releases and settlement agreements, not a nuanced analysis, and attorneys and taxpayers should consult with a tax advisor about their particular circumstances.[1]

General Tax Principles

When cash changes hands, there are almost always tax implications. This is because the Internal Revenue Code defines gross income extremely broadly—all income from whatever source derived unless an exception applies. Section 61(a).[2] Almost all payments form an employer to an employee or former employee will be included in gross income, including payments related to employment releases and settlement agreements.

One exception to gross income relevant to employment releases and settlement agreements is amounts received as damages on account of personal physical injury or physical sickness, which the Internal Revenue Service (IRS) considers to be limited to observable physical harm. Section 104(a)(2);[3] PLR 20004122. This exception does not apply to punitive damages or workers' compensation. Section 104(a)(2); Treasury Regulation Section 1.104-1(c)(1). If the origin of a claim is for personal physical injury or physical sickness, then all damages from the injury or sickness are excludable (other than punitive damages or workers' compensation), including lost wages if the personal injury in question made the taxpayer incapable of earning it. See Comm'r v. Schleier, 515 US 323 (1996).

The exception for personal physical injury or physical sickness does not extend to claims for nonphysical injuries or sickness such as employment discrimination or injury to reputation. Revenue Ruling 2007-14. Emotional distress, including physical symptoms of emotional distress such as insomnia, headaches, and depression, is not a physical injury or physical sickness for purposes of the exclusion. However, damages for emotional distress are excludable

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1 For example, a discussion of Section 409A issues beyond the scope of this paper. Attorneys should also be aware that if severance payments or settlement payments for wages will be made over time rather than in a lump-sum payment, Section 409A may apply. Attorneys should consult a tax attorney familiar with the intricacies of Section 409A if payments classified as wages will be paid over time.

2 All section references herein shall be to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

3 The Internal Revenue Code defines damages to include amounts recovered through a lawsuit or a settlement in lieu of a lawsuit. Section 104(a)(2).

from income if the emotional distress is due to physical injury or physical sickness or to the extent of medical care expenses attributable to emotional distress. Section 104(a).

Given this premise, employment-related releases, judgments, or settlement amounts will almost always be included in the employee's gross income and taxable because hardly ever will the payments fall under the exception for personal physical injury or sickness. The more difficult question is determining whether the payments are wages. Wages are subject to income tax withholding and employment taxes, and wages are reported on a Form W-2. See Sections 3401(a), 3121, and 6051 and Treasury Regulation Section 31.6051-1(a). In contrast, other types of income are not subject to withholding or employment taxes and are reported on Form 1099. Most payments made in an employment context will be treated as wages, and thus, subject to income tax withholding and employment taxes. The parties should expect that payments made to employees or former employees will be treated as wages unless there are facts that warrant classifying payments as other than wages.

Employment taxes imposed on wages consist of the Federal Insurance Contributions Act (FICA) tax and Federal Unemployment Tax Act (FUTA) tax. See Section 3101, 3111, and 3301. FICA is owed on all remuneration paid by an employer to its employees. Half of the FICA taxes are imposed on the employee; the remaining half are imposed on the employer. See Sections 3101 and 3111. The employer is required to withhold an employee's half from the employee's pay. FICA taxes include social security and Medicare. The social security portion is applied to wages paid up to a dollar amount that is set annually; the Medicare portion is not capped. The social security and Medicare portions of FICA tax are imposed separately against the employee and employer at the rate of 6.2% and 1.45%, respectively (totaling 12.4% and 2.9%, respectively). See Sections 3101, 3102, and 3111. FUTA tax is imposed on the employer at a rate of 6% on the first $7,000 of wages paid to an employee. Section 3301. However, there is a credit for state unemployment tax up to 5.4%, so if a state unemployment tax applies, FUTA will generally be only 0.6%. See Section 3302.

For FICA tax purposes, wages are defined as all remuneration for employment unless an exception applies, and employment is defined as "any service, of whatever nature, performed...by an employee for the person employing him." Sections 3121(a) and (b). Wages include payments for "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." Social Security Bd. v. Nierotko, 327 U.S. 358 (1946). Treasury Regulation Section 31.3121(a)-1(i) specifies that remuneration for employment includes payments made after an employer-employee relationship no longer exists.

For employment releases and settlement agreements, whether a payment is treated as wages or non-wages is determined based on the same principles as determining whether damages are includable in income (as discussed in more detail below). See TAM 200244004. Essentially, the IRS and courts look at the nature of what the payments are being made in lieu of to determine

the character of the payment. See TAM 200244004. For example, if the payment is in lieu of lost wages, it will be taxed as wages; or if the payment is in lieu of a lawsuit for injury to reputation, it will be taxable non-wage income; or if the payment is in lieu of a lawsuit for a personal physical injury, it will not be subject to tax. If a payment is comprised of multiple elements, the payment has to be allocated among the different elements.

Employment Releases

When an employment relationship ends, an employer may make a payment to the employee under a variety of circumstances. Generally, termination payments made by employers will be wages subject to withholding and employment taxes because the termination payments will be remuneration for employment. Sections 3121(a). This is true even if employment termination agreements include a general release of all claims arising from employment or termination of employment, and at least in theory, a portion of the payment is in consideration for the release. Without a bona fide dispute at the time the release is executed, termination payments will be taxed as wages.

Looking at cases involving the taxable-nontaxable distinction, the IRS and courts have taken the position that a general release is not enough evidence to show that a portion of the payment was to avoid litigation rather than to compensate employees for the employee-employer relationship. The mere presence of a release or waiver is not sufficient to exclude payments from income. See Bland, TC Memo 2000-98 (finding that a payment was not excludable income even though the taxpayer argued that the employer knew that she could have brought a claim for intentional infliction of emotional distress at the time the release was executed when the release was general without reference to any specific claim, was treated as a severance payment on the employer's books, and was reported as wages on a Form W-2); Ball, TC Memo 1997-549 (finding that a terminated employee was not entitled to exclude any portion of the termination payments from income for a general release of all claims arising from employment or termination of employment); Galligan, TC Memo 1993-605 (finding that an agreement that contained a release for undisclosed or potential claims was not sufficient evidence to establish that payments were not taxable). There has to be additional facts surrounding the release to make a payment excludable from income. See Paton, TC Memo 1992-627 (payment to deceased employee's spouse was excludable from income when the release was obtained the spouse's attorney raised the possibility that employer was responsible for death).

If employees want at least a portion of a termination payment not to be treated as wages, they have to raise a bona fide dispute before a release is signed. The alleged dispute should be included in the agreement with particularity. Unless employees raise a bona fide dispute, the employer should treat the termination payment as wages subject to withholding and employment taxes.

Settlement Agreements for Employment Claims

When reaching a settlement agreement, the parties should consider the tax implications of their agreement. Employees should understand whether the settlement payment will be taxable income and whether it will be wages subject to withholding and employment taxes. Employers need to know how to report the payments and whether they have an obligation to withhold. If employers do not properly withhold taxes, they are liable for 100% of the taxes that should have been withheld from the employee's pay, so it is important for employers to get it right.

Both employers and employees alike have an incentive to characterize payments as non-wage payments to avoid employment taxes, and employers are indifferent and employees prefer non-taxable payments to avoid tax altogether. Because the parties' interests are aligned, the IRS may be skeptical of allocations in a settlement agreement. If the parties document their reasoning and support their allocation, it will be helpful to demonstrate to the IRS that the allocation was reasonable, making it more likely the IRS will accept the parties' allocation. Including the allocation in the settlement agreement also makes sure that the parties are on the same page for how the payments will be reported and taxed.

Settlement proceeds should be allocated to wages, non-taxable damages, other income, and attorneys' fees, as applicable, based on the substance of the claims and the facts and circumstances surrounding the claims. There is not a set formula for allocating settlement payments; it has to be done based on the particular facts. As stated above, the same principles used to determine whether a settlement payment is taxable versus non-taxable are used to determine if settlement payments are wages or non-wages. The IRS and courts look at what the payments are made in lieu of and what claims they can be tied to, and they ignore any allocations that appear to be unreasonable or tax-motivated. See LAFA 20114704F (IRS determined it could reallocate a settlement to wages where the settlement agreement did not provide the methodology for the allocations and appeared arbitrary); Burditt, TC Memo 1999-117 (the IRS disregarded the allocation in the settlement agreement where it appeared entirely tax-motivated where the defendant was indifferent to how the allocations were made). The IRS and courts look at the actual circumstances of the settlement regardless of what the settlement agreement states. See Knoll, TC Memo 2003-277 (court ignored an allocation to personal injury when the employer was not aware of the personal injury at the time of the settlement was agreed to, and only reallocated a portion of the settlement amount to personal injury instead of wages when it learned of the potential tort claim). Attorneys should make sure that the circumstances reasonably support the allocation they agree on and avoid allocations that are tax-motivated rather than supported by the facts.

How settlement proceeds are allocated determines how they are reported. Unless the settlement proceeds are non-taxable, generally the entire amount is included in the employee's gross income either as wages or non-wage taxable income depending on the nature of the claim. This is true even if a portion of the settlement proceeds are paid directly to an attorney for

attorneys' fees. There is a limited exception for attorneys' fees and court costs included in a judgment or settlement for unlawful discrimination, among a few other claims, which are deductible from gross income. Section 62. The portion of the settlement proceeds paid to attorneys is income to the employee because the employee is relieved of the obligation to pay the attorney. It is treated like the proceeds were first paid to the employee and then the employee used the proceeds to pay the attorney.

Under this theory, if the entire settlement is for wages, even the portion paid to the attorney should be subject to withholding and employment taxes. However, the IRS's position is that if attorneys' fees are separately stated in a settlement agreement, the attorneys' fees will not be subject to employment taxes or withholding, but will be taxable income reported on a Form 1099 for the employee. See LAFA 20133501F. Alternatively, if the attorneys' fees are not separately stated, the full amount of the payment will be treated as wages, even if the attorneys' fees are paid out of the settlement proceeds and the employee never receives that portion of the settlement. See LAFA 20133501F.

Attorneys should recognize that the best practice is to ensure that the language in the settlement documents reflects the actual nature of the claims and the character of the payments and that the employer meets its specific reporting requirements with respect to paying employment taxes, withholding, and reporting. This is particularly true if payments will be allocated to non-wage or nontaxable income in order to demonstrate that the allocation is reasonable and not arbitrary.

Reporting Payments Made to Attorneys

There are special reporting rules for payments made in the course of a trade or business to attorneys in connection with legal services. Section 6045(f). The rules apply when an attorney is named on a check whether the legal services were provided to the payor or whether any portion of the proceeds is kept by the attorney. The payor has to file a Form 1099 with the IRS and furnish a copy to the attorney reporting the amount of the payment made to the attorney, even if the attorney will not be the ultimate recipient of the payment; for example, a settlement check for the attorney's client is payable to the attorney even though the attorney will pass it on to the client. As discussed above, reporting requirements for payments made to attorneys are in addition to reporting requirements for the employee. Any attorneys' fees paid directly to the attorneys are also included as taxable income for the employee unless the entire settlement is non-taxable.

When the attorney and the employee are joint payees on a single, taxable settlement payment, the payor has to report the full amount of the payment on a Form 1099 for the attorney and appropriately report the full amount of the payment to the client as well. See Treasury Regulation Section 1.6045-5. If separate payments are made to the attorney and the employee, only the amount paid to the attorney is reported on Form 1099 for the attorney, but both

payments are reported as income for the employee. If the attorney does not want to receive a Form 1099 for the full amount, the settlement agreement should specify that the employer will make two separate payments or that the attorney's name will be included on the payee line as "in care of" or other manner that does not give the attorney the power to negotiate the check. Treasury Regulation Section 1.6045-5(d)(4).

Payors are required to get attorneys' tax identification numbers before or at the time of payment, and attorneys are required to provide payors with their tax identification numbers. Treasury Regulation Section 1.6045-5(e). If a payor does not receive an attorney's social security number, the payor is required to impose backup withholding at a rate of 28%. See Treasury Regulation Section 1.6045-5(e); Section 3406. The amount withheld does not reduce the amount of the payment reported for the employee or the attorney. Treasury Regulation Section 1.6045-5(d)(5). For example, if an employer settles a suit for $300,000 and pays the settlement to the attorney and employee jointly, but the attorney does not provide a tax identification number, the employer has to withhold 28%, paying $84,000 to the IRS and $216,000 to the attorney and employee. The employer has to report the full $300,000 on a Form 1099 for the attorney and the full $300,000 appropriately for the employee. See Treasury Regulation Section 1.6045-5(f). This is a result attorneys should avoid, so they should be prepared to provide appropriate information to the employer.

The parties have control over who should be named on the checks, so they have control over how the payments will be reported with respect to an attorney. Treasury Regulation Section 1.6045-5(f) provides many examples that illustrate how the attorney reporting requirements apply under various scenarios. The parties should consider the possibilities and make a conscious decision about how the payments will be made in light of the reporting obligations. Although there may very well be instances where other factors weigh in favor of joint payees even if the attorney will receive a Form 1099, the attorneys should not use it as a default without thinking through the reporting consequences.

Conclusion

As the discussion above demonstrates, it is important to understand the tax implications of employment releases and settlement agreements. Attorneys should recognize that there is not a lot of flexibility in how employment releases and settlement agreements are taxed. The tax treatment is controlled by the substance of the transaction, not the form, so there is not much room to negotiate how payments will be reported. That being said, it is a better practice to specify how the payments will be reported in the settlement agreement rather than leaving it up to the accountants after the fact. When the facts do support allocating a portion of settlement payments or employment releases to non-taxable income or non-wages, it is important that the agreement clearly reflect the facts that support that allocation. The tax implications shouldn't be ignored. Neither party should want the tax implications and tax reporting obligations to come as a surprise.

NOTES

Cybersecurity Employment Related Concerns and Best Practices

RISKSENSE
TRANSFORMING CYBER RISK MANAGEMENT

Cyber Security Employment Related Concerns and Best Practices
Presented to:

Employment and Labor Law Section of the State Bar of New Mexico
Presented by:

RiskSense, Inc.
Mark Fidel, MBA, JD,
Co-Founder, Head of Corporate Development
October 6, 2017

Agenda

- What is Information Security and how does it relate to Employment and Labor Issues?
- Info Security Policies Overview - Designed to protect client, employee and business data
- Data Classification and Sensitivity - *What* deserves to be protected depends on what it *is*
- Risks and Threats to Information
- Data Security Tools and Techniques - What can the business do to protect client and employee data?
- Putting it Together
- Top Tips to Remember

2

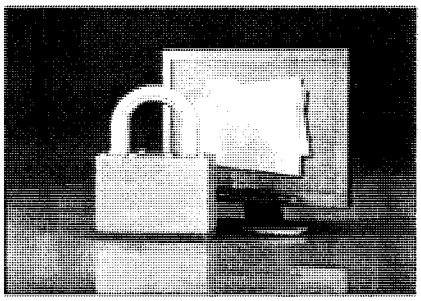
Information Security Awareness Overview

- Understand what information security is and how it relates to Employment and Labor Issues.
- Understand risks and threats to Information, the relationship to security, and how to protect yourself, employee and client data.
- Understand tools and techniques employees should use to protect data.
- Understand how and when to report incidents of security concern.

3

What is "Information Security"?

- The protection of valuable information assets against loss, disclosure, or damage.
- Applies to all information and information assets:
  - ✓ Electronic
  - ✓ Paper
  - ✓ Verbal



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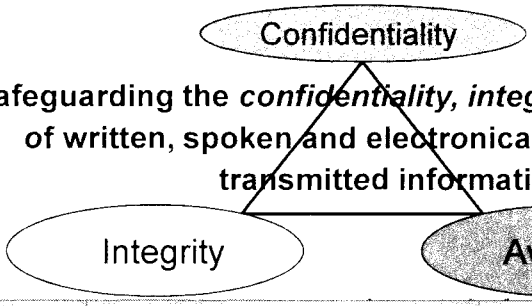
The CIA Triangle



Safeguarding the *confidentiality, integrity and availability* of written, spoken and electronically recorded and transmitted information.

Confidentiality	"Preserving authorized restrictions on information access and disclosure, including means for protecting personal privacy and proprietary information."	A loss of *confidentiality* is the unauthorized disclosure of information
Integrity	"Guarding against improper information modification or destruction, and includes ensuring information non-repudiation and authenticity."	A loss of *integrity* is the unauthorized modification or destruction of information
Availability	"Ensuring timely and reliable access to and use of information."	A loss of *availability* is the disruption of access to or use of information or an information system

5

Information Security Executive Summary Policy

- The Information Security Executive Summary should establish the information security program and the supporting organization structure for the organization.
- Directs that controls be implemented to ensure confidentiality, integrity and availability of the organization's information and technology resources.
- Defines various roles and responsibilities for the management and administration of information security within the organization.
- This summary along with the other Information Security policies make up the overall information security policy for the organization.

6

Data Classification and Sensitivity

Information must be protected according to its sensitivity, criticality and value, regardless of the media on which it is stored, the manual or automated systems that process it, or the methods by which it is distributed.

To provide a basis to determine appropriate security levels, the organization's data (information) is or can be classified into categories.

Examples of data classification categories:

Encrypted

Confidential

Public

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Data Classification and Sensitivity (Continued)

Examples of Encrypted Data could include, but may not be limited to:

- Social Security Number (or part of a SSN)
- Protected Health Information
- Employee Benefits File (both paper and electronic)
- Employee Health Records
- Protected payroll and health benefits deduction Information
- Payroll file (both paper and electronic), subject to potential HIPAA Privacy Rule, IRS and other Federal or State bound restrictions (Garnishments)
- Banking Information
- Tax Information

8

Data Classification and Sensitivity (Continued)

Examples of Confidential Data could include, but may not be limited to:

- Payroll file (both paper and electronic) excluding those items listed in HIPAA Privacy Rule, IRS and other Federal or State bound restrictions
- Personnel file (both paper and electronic) excluding those items listed in HIPAA Privacy Rule, IRS and other Federal or State bound restrictions
- Employment transactions
- Work in Progress Budgets
- Employee Address

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Data Classification and Sensitivity (Continued)

Examples of Public Data include, but are not limited to:

- Records accessible pursuant to the NM Inspection of Public Records Act
- Information on publicly accessible organization web sites

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Data Classification and Sensitivity (Continued)

- Public data is information that may or must be open to the general public. Public data is not sensitive or confidential, and requires no special protection.
- Public data, while subject to the organization's disclosure rules, is available to all organization employees and all individuals or entities external to the company.
- This is the only information that is readily shared with the general public.

11

Threats Introduction

Current Threats

The following slides outline the kinds of threats you may encounter with suggestions on how you can protect yourself, client data, and organization systems from harm.

Basic Concept

You Control What You Choose to Click

Most end user threats require some form of user interaction, and are targeted specifically in hopes that you will click on a harmful link, attachment, picture, video or icon in an email or web page, including social media applications

What you can do

STOP, and THINK, BEFORE you CLICK

Your job is to be aware, be alert and diligent. Always look for the signs that external entities are trying to gain access to your PC and your network.

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Physical Threats

Your Workspace

Individuals that you do not know may be in your physical space, in the office and at your other work locations.

- Do not allow unauthorized access to your work area.
- Do not let anyone borrow your keys or security badge

Your Devices

Individuals will look for easy ways to steal PC's, cell phones, and other devices.

- Put away and lock your PC and other devices when not using them.
- If you have a laptop or other mobile device, make sure it is encrypted.
- If you use a thumb drive or external hard drive, make sure it is encrypted.
- Do not leave your PC unattended, particularly in public spaces.

Your Password

Your password is also a key. Individuals will try to steal your passwords if they are in plain sight or easy to determine.

- Do not write down your passwords on sticky notes or paper in plain sight.
- Change your passwords frequently and make them hard to guess.

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Physical Threats

Report immediately all suspicious activities and breaches of physical security

14

Physical Threats: Protect Yourself

- *Never share your keys, passwords, or access tokens with others.*
  - This includes co-workers or other employees!
- *Never prop the door open or allow strangers inside the building*
  - Ask them if they would politely check in with the front desk, then escort the visitor
- *Destroy all confidential paper data*
  - Place in provided locked shred bins for disposal
  - Shred it yourself if you have access to a personal shredder
  - Cross-cut only – Straight-cut is easy to re-assemble
- *Secure all confidential information when you are not around*
  - Lock information in filing cabinets
  - Clean desk policy
- *Always lock your workstation when you step away (Windows Key + L)*
  - This prevents others from accessing your resources
- *Report suspicious activity or persons immediately*

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Email Threats

- Common Attacks
  - Phishing
  - Malicious attachments
  - Hoaxes
  - Spam
  - Scams (offers too good to be true)
- Best Practices
  - Don't open suspicious attachments
  - Don't follow links
  - Don't attempt to "unsubscribe"

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Phishing

- Deceptive emails to get users to click on malicious links
  - Enter sensitive information
  - Run applications
- Look identical to legitimate emails
  - Your Bank
  - PayPal
  - Government
- Variants Include:
  - Vishing – Same concept but with voice
    - User instructed to call into system
  - Text messages and postal mail

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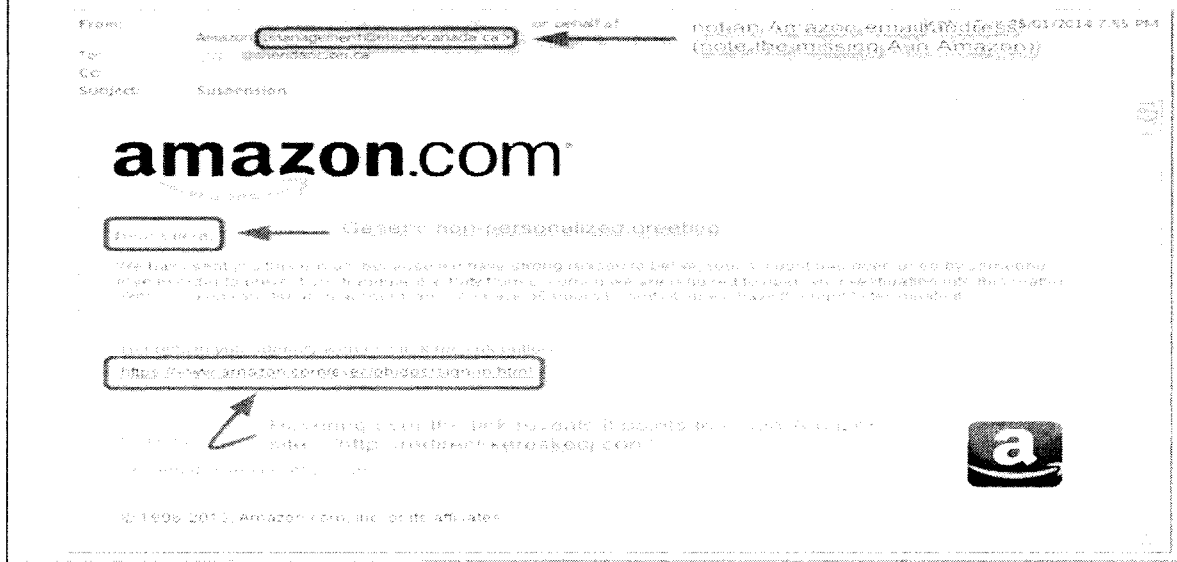
Phishing Example - Email



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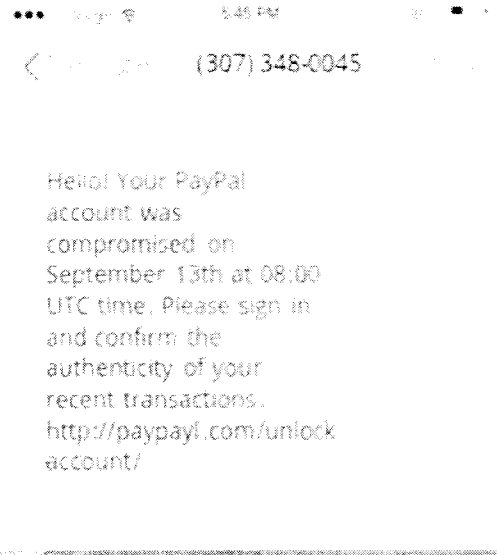
Phishing Example - SMS



19

A Recent Email...

A Recent Email…

As part of our security measure, We regularly screen activity in the Bank of America system. You received this message due to an issue on your account.

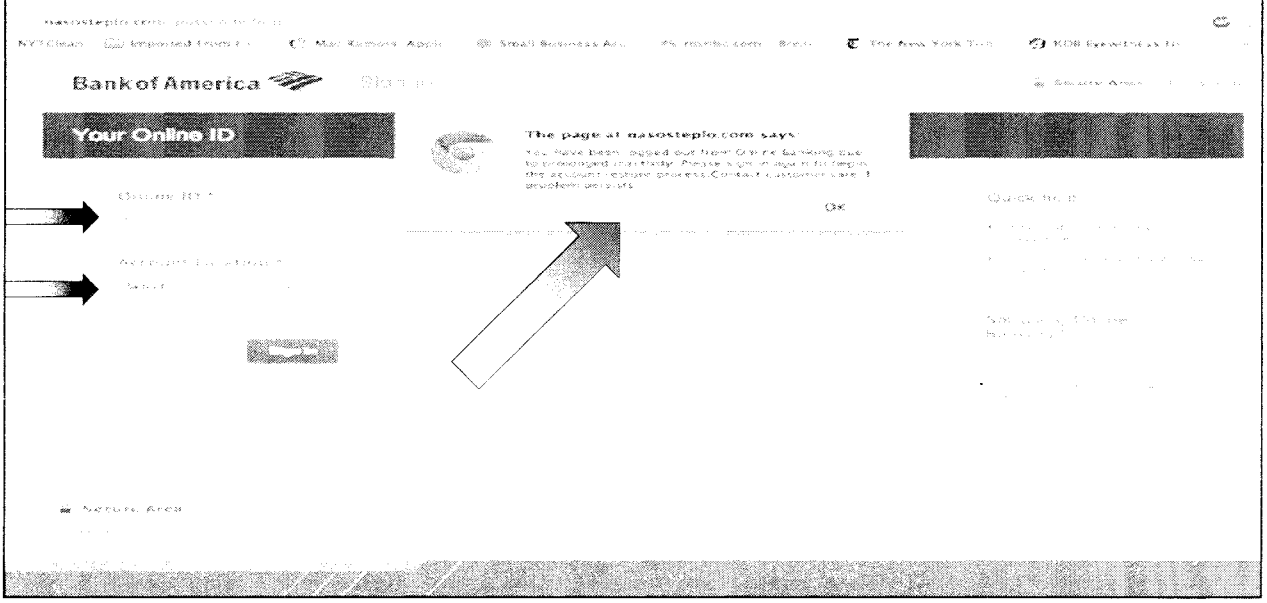
Due to unusual number of invalid login attempts on your account, we have reason to believe there might be security breach on your account.

Your account requires extra verification process to ensure your identity and your account security.

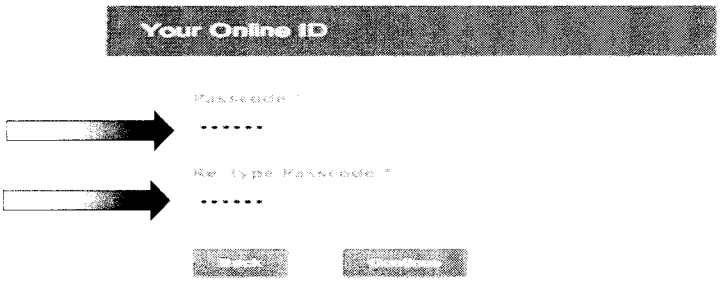
To continue to the verification process and ensure your account security, Please Click Here

Security Checkpoint: This email includes a Security Checkpoint. The information in this section lets you know this is an authentic communication from Bank of America. Remember to look for your SiteKey every time you sign in to Online Banking.

• The Resulting Website…



- The Resulting Website…



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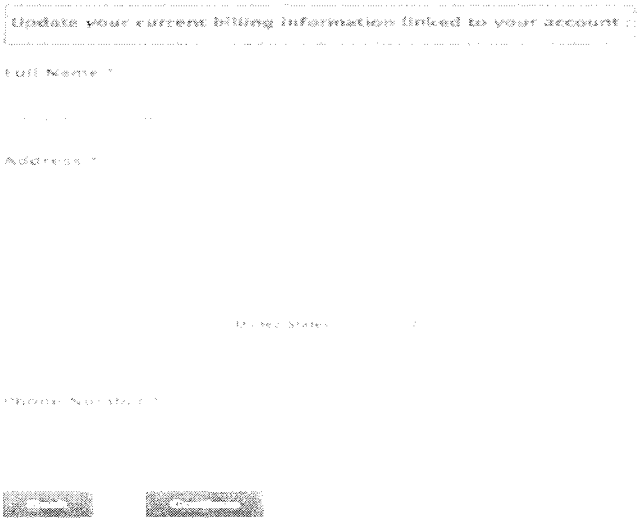

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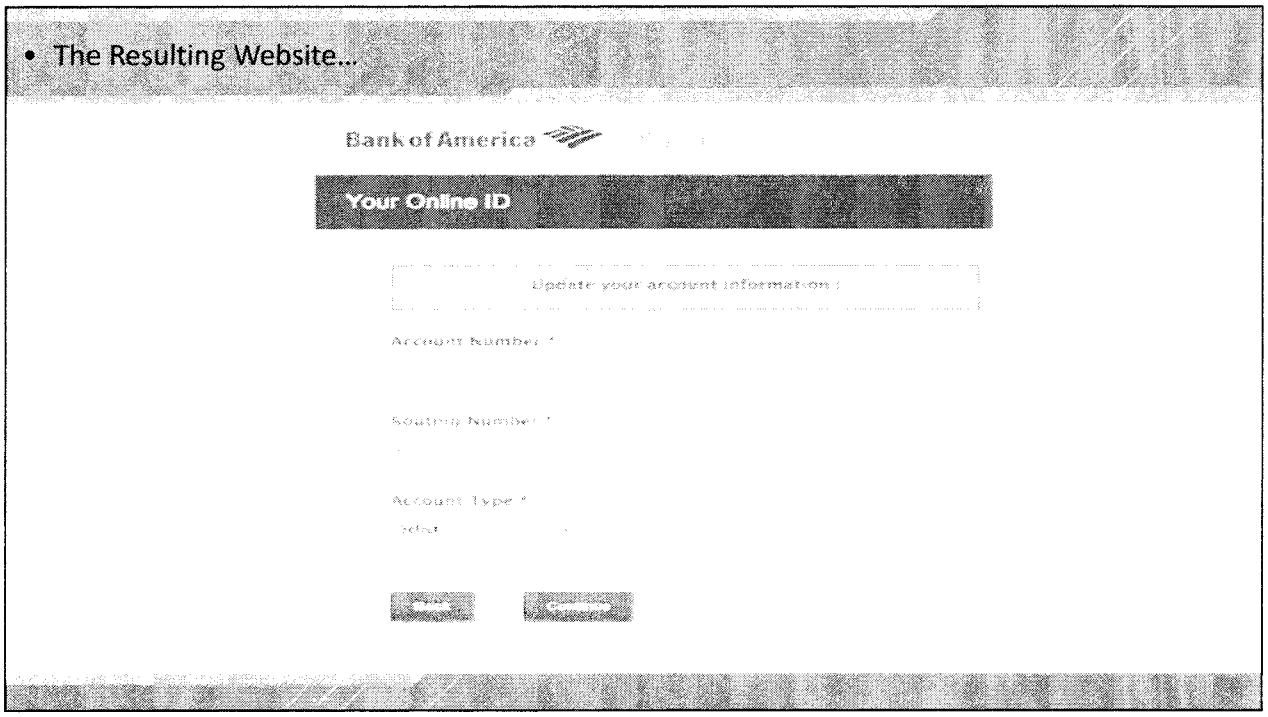

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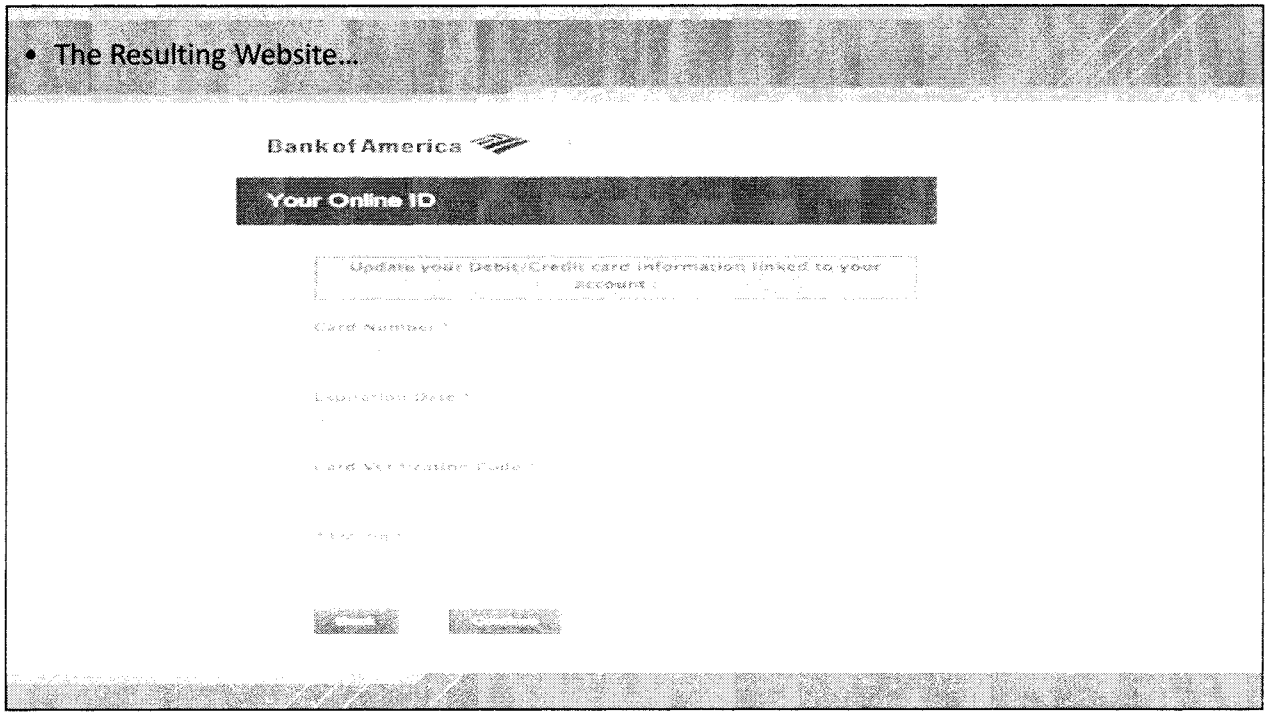

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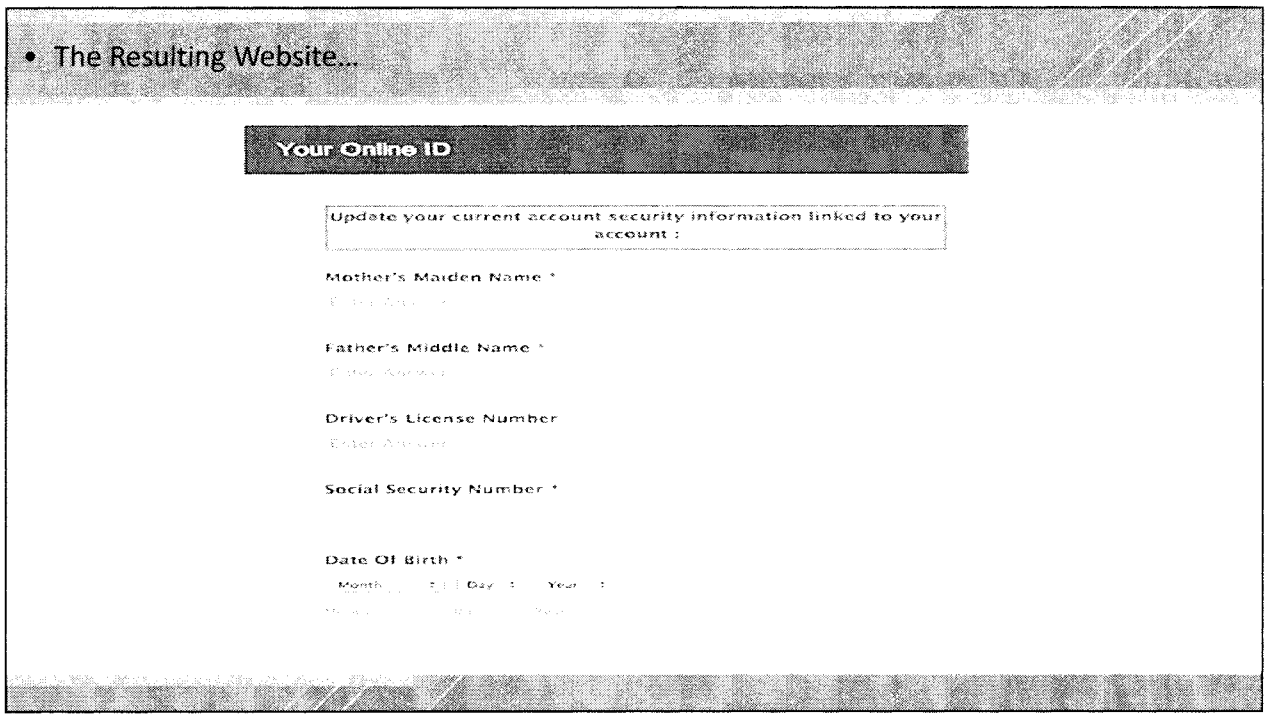

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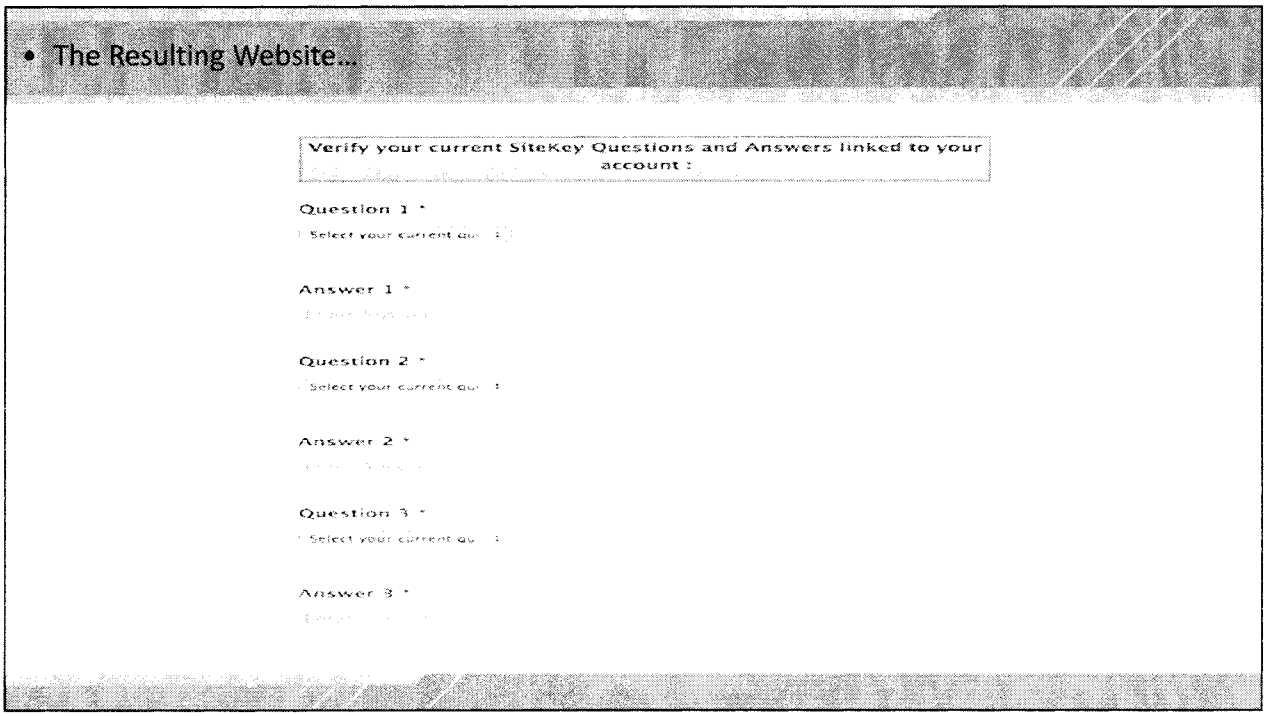

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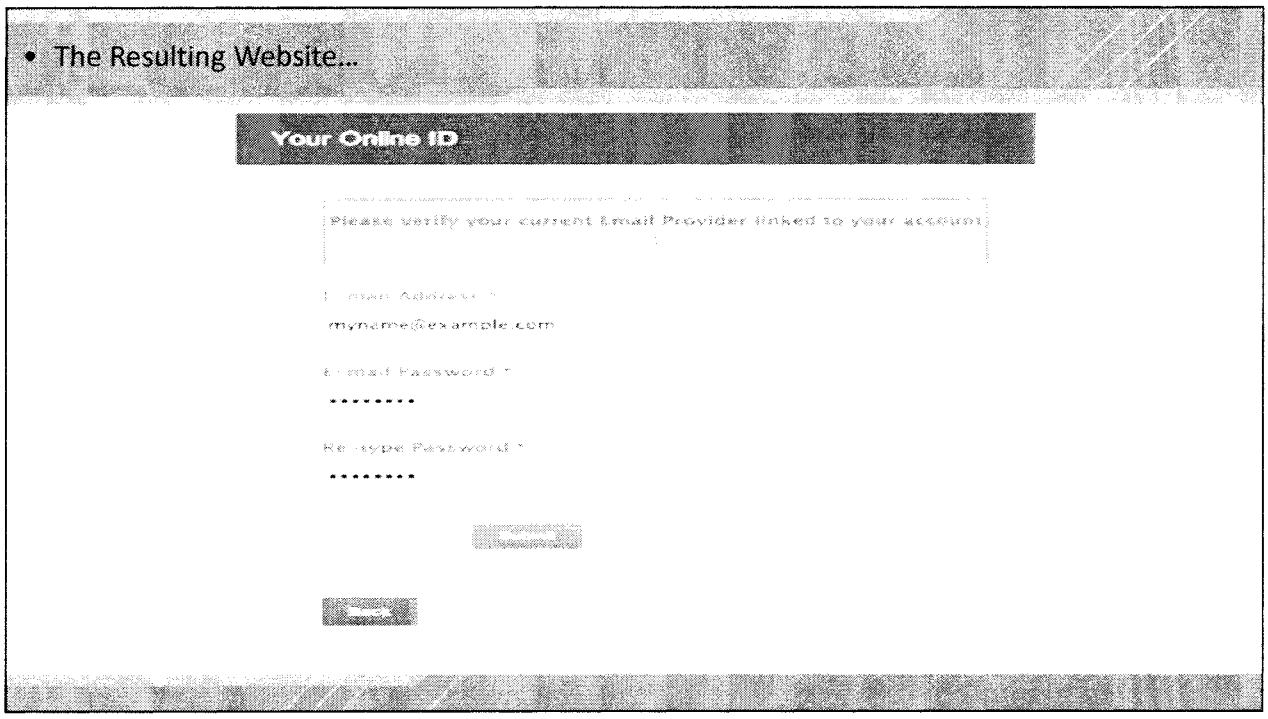

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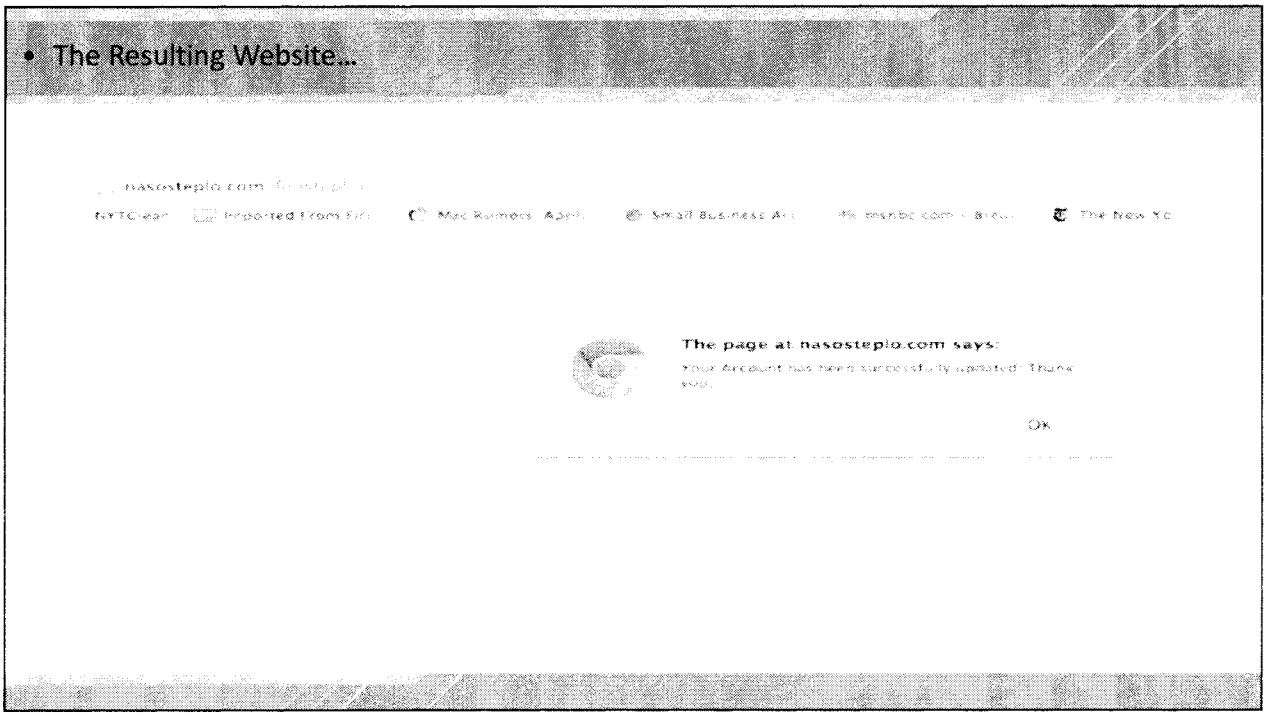
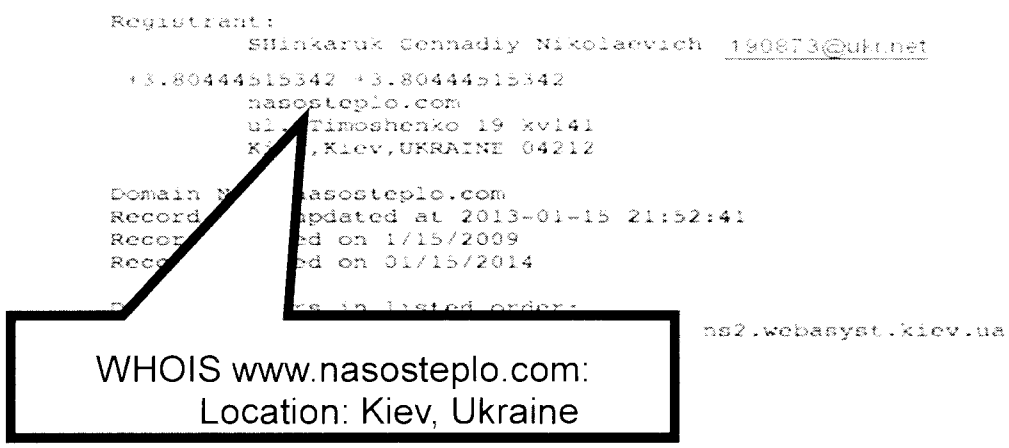


But Wait…



Digital Threats: Protect Yourself

- *Never disable anti-virus programs or your firewall*
  - This causes a lapse in security
- *Never download documents or files without the express permission of a supervisor, or unless otherwise stated in IT Policies*
  - Could contain malware/spyware, viruses, or Trojans
- *Don't open unexpected email attachments*
  - Make sure it's a file you were expecting and from someone you know
- *Never share login or password information*
  - Anyone with your credentials can masquerade as you!
- *Do not ever send confidential information or customer data over unencrypted channels*
  - Email
  - Instant Messaging
- *If you suspect you have been a victim of fraud, theft, or a hacking attempt, notify departmental computer system administrators and Information Technology (IT) immediately!*

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Internet Threats

Browsing Can Hazardous To Your PC

The Internet is a significant resource for business and government services. However, some of the same issues as with email can create security issues that you need to be aware of.

The Common Threat: On the web, the threats come from malicious links. Most of the threats come when you click on a link that launches a malicious program or re-directs you to a dangerous site.

Result: If you click, you may launch harmful programs or be directed to a harmful web site. You may then find your personal, client, or sensitive business information compromised and you may subject your PC and network to malicious software.

Stop: Do not automatically click on Internet links until you have confidence in them. This includes pictures, videos, and navigational elements.

Think: Look at the actual address for the links in question. For instance if the link indicates "Click Here" be sure to hover your mouse pointer over the link and investigate the actual web address before you proceed.

Click: Only after you are completely confident that the web site is safe.

Report all suspicious web sites to IT!

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Telework Threats

For Mobile Workers: Be Careful With Your Connections

The ability to work away from the office is beneficial and flexible, mobile workers need take special care of the inherent threats to the organization's systems when connected to public access points. Special care should taken when working in these environments.

Wireless Networks: Assume when you connect to a public wireless access point that it is inherently not secure. Other individuals can potentially "see" your activity. When connecting to a sensitive organization system, this could expose your sensitive data.

Virtual Private Network: VPN allows you to launch a secure Internet connection so that even with a public access point, you are able to work connected to your home network, applications and databases with a greater level of security.

Stop: Do not connect to a public wireless access point without VPN.

Think: When you are prompted to connect to a public wireless node, know what you are connecting to and assume it is public.

Click: Only proceed if you are confident in the connection and are using VPN.

Keep Your Mobile Computing Safe!

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Social Engineering

- People are often the weakest links
  - All the technical controls in the world are worthless if you share your password or hold the door open
- Attempts to gain
  - Confidential information or credentials
  - Access to sensitive areas or equipment
- Can take many forms
  - In person
  - Email
  - Phone
  - Postal Mail

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Remote Social Engineering

- Often takes place over the phone
  - Attempts to gain information that may help stage further attacks
  - May pose as technical support, telephone company, or a vendor
- Usually requests sensitive information
  - Login credentials or account information
  - Employee names and methods of contact
  - Information about computer systems
- If you are unsure, or something seems suspicious, always verify by calling the official number listed in phone directory!
  - Ask for name, company, callback number, and issue inquired about
  - Inform the caller you will call back

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Suspicious Calls

Report All Suspicious Calls to IT.

Do not provide any information to unknown callers.
Do not provide basic information to the caller if they are asking information gathering questions like:

- What company have I called?
- Is this is a business line?
- Who am I speaking with?

Even the simplest piece of information can be used in reconnaissance against us.

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Face to Face Social Engineering

- Social engineering can become very complex
  - Custom costuming, props, equipment, vehicles, signage, and logos
  - Elaborate ruses and back-stories
- Involves in-depth planning
  - Knowledge of personnel, internal procedures
    - Can be prefaced by dumpster diving, remote information gathering, by phone (pretext calling)
  - Knowledge of locations and hours of operation
- May precede digital attacks or breaches
- Low-tech method, High-reward approach
  - Uses the traditional approach to theft
  - Social engineers seek information: restricted systems, backup tapes, confidential documents, etc.
  - Social engineers manipulate the kindness and willingness of people to help others.

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Red Flags: Indicators of Social Engineering Occurring

- Lack of business credentials or identification
  - Unable to present a business card or valid ID
  - Advanced social engineers will provide fraudulent documentation, such as a fake business cards or illegitimate work order forms.
- May make small mistakes
  - Not knowing the area
  - Unsure who placed the work order
- Attempt to drop names to sound more convincing
  - "I've worked with <Mayor Berry or Peter Ambs> before. They know me."
- Rushing
- Carrying large boxes or items so that someone will open a secured door for them and allow them inside.
- **Remember:** Social engineers will be polite and courteous until they don't get what they want – then they may try to be intimidating!

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Social Engineering: Protect Yourself

- Verify the visit with management
  - Make sure the visit has been scheduled and approved
- Always request identification and credentials
  - Require a valid, government-issued form of identification
- Closely monitor and observe visitors and vendors
  - Never leave visitors alone in sensitive areas
  - Visitors should be escorted AT ALL TIMES
  - Closely observe their activities
- Never trust suspicious emails
  - If an email seems out of the ordinary, has an incorrect signature, or just seems out of character, pick up the phone and verify!
- If the visit cannot be verified, the visitor should not be granted access – period!

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Email Encryption Tools

When In Doubt, Encrypt!

- If emailing sensitive information, password protect the attachment and call or text the recipient with the password.

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Strong Passwords

For many systems, passwords are the sole form of authentication. Poor password complexity, including insufficient length or the inclusion of commonly-used words, may allow an attacker to guess the password and gain unauthorized access to the system.

Generally, the more complex the password, the more difficult it is for an attacker to guess.

Passwords **SHOULD NOT** be:

- A derivative of the username
- A word found in a dictionary (English or foreign)
- A dictionary-word spelled backwards
- A dictionary-word (forward or backwards) preceded and/or followed by any other single character (e.g., secret1, 1secret, secret?, secret!)

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Strong Passwords – Additional Guidelines

DO NOT use an easy-to-guess password. Some examples of passwords that would be easy to guess:

- Names of family, pets, friends, co-workers, etc.
- Computer terms and names, commands, sites, companies, hardware, software.
- Birthdays and other personal information such as addresses and phone numbers.
- Word or number patterns like aaabbb, qwerty, zyxwvuts, 123321, etc.

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Passphrases and Mnemonics

Mnemonic: A device such as a pattern of letters, ideas, or associations that assists in remembering something.

Passphrase: A sequence of words or other text used to control access to a computer system, program or data. A passphrase is similar to a password in usage, but is generally longer for added security.

Mnemonic: TRIJ1TPID*

Passphrase: TheRaccoonIsJustOneTrashPandaInDisguise

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Multi-Factor Authentication

Multi-Factor Authentication (**MFA**) is a method of computer access control in which a user is only granted access after successfully presenting two or more separate pieces of evidence to an authentication mechanism.

There are three factors in proving you are who you say you are:

- Something you have: A physical object in the possession of the user, such as a USB stick with a secret token, a bank card, a key, etc.
- Something you know: A secret known to the user, such as a password or PIN
- Something you are: A physical characteristic of the user (biometrics), such as a fingerprint, eye iris, or voice.

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Multi-Factor Authentication (Continued)

Using a single factor twice is not Multi-Factor. Therefore using two different passwords for access is not Multi-Factor.

A common example of Multi-Factor Authentication is a bank card and an ATM. You physically must have the bank card, and know the PIN to withdraw cash.

Another common example is having an access code sent to a phone via SMS to your cellphone after you provide your initial password. The initial password is the first factor, you having the phone to receive another code is the 2nd factor.

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How to Report Incidents

To Report Incidents of Security Concern, **Contact IT**

In case of an urgent situation or emergency, please contact your supervisor, departmental computer system administrators and Information Technology

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Top Tips To Remember From Today's Training

- Never write down or share your passwords
- Don't click on links or open attachments in email
- Use antivirus, anti-spyware, and firewall and don't disable
- Don't send sensitive data over unencrypted channels
- Dispose of data properly
  - Cross-cut shredding or use onsite locking bins
  - Multiple-wipe or physically destroy hard drives

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Top Tips To Remember From Today's Training (Continued)

- Don't run programs from un-trusted sources
- Lock your machine if you step away
- Properly secure information
  - Safes, locked drawers for physical documents
  - Encryption for digital information
- Verify correct person, website, etc.
- If something seems too good to be true, it probably is!

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RISKSENSE
TRANSFORMING CYBER RISK MANAGEMENT

NOTES

2017 Labor Update

Labor Law Update 2017

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Outline

I. NLRB in the Courts
II. NLRB Election Rules in Practice
III. "Right to Work" and Local Ordinances

NLRB in the Courts

NLRB v. Murphy Oil USA, Inc.

- Fifth Circuit had issued *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir.2013).
- Meanwhile *Murphy Oil* working its way through Board; Board followed its non-acquiescence policy.
- "The Board may well not know which circuit's law will be applied on a petition for review. We do not celebrate the Board's failure to follow our D.R. Horton reasoning, but neither do we condemn its nonacquiescence." *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

NLRB v. Murphy Oil USA, Inc.

- Issue: Whether arbitration agreements an employer requires employees to sign containing a waiver of the right to pursue class or collective litigation violates the NLRA.
- Section 7: "Employees shall have the right to … engage in other concerted activities for the purpose of …other mutual aid or protection…"

NLRB v. Murphy Oil USA, Inc.

- Section 8(a)(1) makes it an ULP to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" section 7.
- Historic precedent: "yellow dog" contracts.
- FAA, Section 2: Agreements to arbitrate enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."

NLRB v. Murphy Oil USA, Inc.

- Courts of appeal have rejected NLRB's argument, and NLRB petitioned for certiorari.
- Issue: "Whether employer-imposed arbitration agreements that bar individual employees from pursuing work related claims on a collective basis in any forum violate 29 U.S.C. 158(a)(1) because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" for "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2."
- Solicitor general switched sides!
- Oral argument October 2, 2017

King Soopers, Inc. v. NLRB

- 859 F.3d 23, 36–39 (D.C. Cir. 2017)
- Issue: how should job-search expenses be treated in a back pay calculation?
- Held: Court approved of NLRB's change, pursuant to which employee may recover for all reasonable search-for-work and work-related expenses, without any cap based on interim earnings.

Midwest Division-MMC, LLC v. NLRB

- 867 F.3d 1288 (D.C. Cir. 2017)
- Issue: (among several) Jurisdiction of NLRB over Peer Review Committee of private hospital mandated by state law to monitor the quality of care furnished by medical professionals.
- Held: NLRB had jurisdiction; not a "state or political subdivision thereof"

E.I. Du Pont de Nemours

- 364 NLRB No. 113 (Aug. 26, 2016)
- Issue: what unilateral change can an employer make during contract negotiations pursuant to the expired managements rights clause?
- Case had been sent back to Board to deal with a conflict in its precedent.

E.I. Du Pont de Nemours

- Board overruled *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), Capitol Ford, 343 NLRB 1058 (2004), and Beverly Health & Rehabilitation Services, 346 NLRB 1319 (2006).
- Board returned to *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), *enfd. in relevant part* 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353 (2003),
- Held: discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause are unlawful.
- On appeal to D.C. Circuit.

NLRB Election Rules in Practice

New Election Rules - History

- Board had tried to make similar changes in 2011. *See* 76 Fed. Reg. 80,138 (Dec. 22, 2011).
- They were invalidated on *Noel Canning* grounds, without reaching the substantive merits of their validity. *Chamber of Commerce v. NLRB*, 879 F. Supp. 2d 18, 20–21 (D.D.C. 2012).
- New Rules went into effect April 14, 2015. *See* 79 Fed. Reg. 74,308 (Dec. 15, 2014).
- Not unanimous; Board Members Miscimarra and Johnson dissented. *Id.* at 74,430–60.
- Have withstood two legal challenges. *See Associated Builders & Contractors of Texas, Inc. v. Nat'l Labor Relations Bd.*, 826 F.3d 215, 218 (5th Cir. 2016); *Chamber of Commerce v. NLRB*, No. 15-0009 (ABJ), 2015 WL 4572948 (D.D.C. July 29, 2015).

New Election Rules - Purpose

"These rules were designed to remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Addressing discrete, specifically identified problems, the Board's updated representation case rules sought to streamline Board processes, increase transparency and uniformity across regions, eliminate or reduce unnecessary litigation, duplication, and delay, and modernize the Board's rules on documents and communications in light of current communications technology." -- NLRB Annual Review of R-Case Rules

New Election Rules - Results

Petitions Filed		
	5/15/15 – 4/14/16	4/14/14-4/14/15
Total Petitions Filed	2,674	2,792
-- RC	2,144	2,141
-- RD	337	436
-- RM	49	56
-- UC	78	79

New Election Rules - Results

Median Days between Petition Filing and :		
	5/15/15 – 4/14/16	4/14/14-4/14/15
Pre-Election Hearing:	10	14
Election Agreement:	8	11
Election:	24	38
-- With Election Agmt.	23	38
-- W/O Election Agmt.	34	64
Certification:	35	50

New Election Rules - Results

Election Results		
	5/15/15 – 4/14/16	4/14/14-4/14/15
Union Win %	65%	66%
--RC Petitions	70%	71%
--RD Petitions	41%	40%
--RM Petitions	29%	39%
Election Agreement Rate:	92%	92%
Petitions Blocked by ULPs	107	194

"Right to Work" and Local Ordinances

Statutory Background

- Section 8(a)(3) makes it an ULP for an employer to discriminate in order to encourage or discourage membership in a union.
- Proviso allows employers to agree with union "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later."
- Section 14(b): "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

"prohibited by State or Territorial law"

- Reverse preemption; generally, in the private sector, federal labor law is supreme.
- However, "with respect to those state laws which § 14(b) permits to be exempted from §8(a)(3)'s national policy '(t)here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws...." *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 417 (1976).
- *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1190 (10th Cir. 2002) held that tribe had inherent sovereignty to enact right-to-work, which was not abrogated by the NLRA. Also, as a federal enclave, state right-to-work laws would not apply.

Recent litigation

- *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty., Kentucky*, 842 F.3d 407, 417 (6th Cir. 2016) ("[W]e conclude that § 14(b)'s use of "State" includes political subdivisions and that Ordinance 300's right-to-work protection is included in § 14(b)'s exception from preemption.).
- Subsequently, state enacted state-wide right-to-work law, but 6th Circuit refused to vacate or decide if it was moot; on certiorari on both issues (mootness and merits).
- *IUOE v. Village of Lincolnshire*, 228 F. Supp. 3d 824 (N.D. Ill. 2017) (disagreeing with *Hardin County* and concluded that "laws of political subdivisions do not qualify as 'State law' under" Section 14(b)").

New Mexico

- As of writing, Sandoval County appears ready to try its luck and enact a county right-to-work ordinance.
- New Mexico Federation of Labor v. City of Clovis, 735 F. Supp. 999 (D.N.M 1990) ("A myriad of local regulations would create obstacles to Congress' objectives under the NLRA. If the Ordinance is allowed to stand, other local governmental entities in New Mexico and presumably elsewhere could enact such ordinances, or different ordinances, concerning the same subject matter. The result would be a crazy-quilt of regulations within the various states.").

Janus v. AFSCME Council 31

- Cert granted 9/28/17
- Question in petition: "Twice in the past five years this Court has questioned its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, __, 132 S. Ct. 2277, 2289 (2012). Last term this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, U.S. , 136 S. Ct. 1083 (2016). This case presents the same question presented in *Friedrichs*: should *Abood* be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment?"

NOTES

EEOC and HRB Charge Process: Responses and Mediation Programs

RODEY | *Law*

EEOC and HRB CHARGE PROCESS: RESPONSES and MEDIATION PROGRAMS

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State Bar of New Mexico
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U.S. Equal Employment Opportunity Commission

What You Can Expect After a Charge is Filed

When a charge is filed against an organization, EEOC will notify the organization within 10 days. A charge does not constitute a finding that your organization engaged in discrimination. The EEOC has authority to investigate whether there is reasonable cause to believe discrimination occurred.

In many cases, the organization may choose to resolve a charge through mediation or settlement. At the start of an investigation, EEOC will advise both the organization and the charging party if the charge is eligible for mediation, but feel free to ask the investigator about the settlement option. **Mediation and settlement are voluntary resolutions.**

During the investigation, the organization and the Charging Party will be asked to provide information. The EEOC investigator will evaluate the information submitted and make a recommendation as to whether there is reasonable cause to believe that unlawful discrimination has taken place. The organization may be asked to:

- submit a **statement of position**. This is the organization's opportunity to tell its side of the story. A resource guide on Effective Position Statements is available.
- respond to a **Request for Information** (RFI). The RFI may ask the organization to submit personnel policies, Charging Party's personnel files, the personnel files of other individuals and other relevant information.
- permit an **on-site visit**. Such visits greatly expedite the fact- finding process and may help achieve quicker resolutions. In some cases, an on- site visit may be an alternative to a RFI if requested documents are made available for viewing or photocopying.
- provide contact information for or have employees available for **witness interviews**. A representative of the organization may be present during interviews with management personnel, but the EEOC investigator is allowed to conduct interviews of non-management level employees without the presence or permission of the organization.

Digital Charge System

EEOC's 53 offices have implemented Phase I of a Digital Charge System to transmit and receive notices and documents through a secure online portal for charges received by EEOC as of January 1, 2016.

- About EEOC's Digital Charge System and Its First Phase of Implementation
- Questions and Answers on Phase I of EEOC's Digital Charge System
- Respondent Portal User's Guide for Phase I of EEOC's Digital Charge System

There are many charges where it is unclear whether discrimination may have occurred and an investigation is necessary. Employers are encouraged to present any facts that they believe show the allegations are incorrect or do not amount to a violation of the law. An employer's input and cooperation will assist EEOC in promptly and thoroughly investigating a charge.

- Work with the investigator to identify the most efficient and least burdensome way to gather relevant evidence.
- You should submit a prompt response to the EEOC and provide the information requested, even if it is believed the charge does not have merit.

  If there are extenuating circumstances preventing a timely response from you, contact your investigator to work out a new due date for the information.

- Provide complete and accurate information in response to requests from your investigator.
- The average time it takes to investigate and resolve a charge was about 10 months in 2015.

  Our experience shows that undue delay in responding to requests for information extends the time it takes to complete an investigation.

- EEOC is entitled to all information relevant to the allegations contained in the charge, and has the authority to subpoena such information. If you have concerns regarding the scope of the information requested, advise the EEOC investigator. In some instances, the information request may be modified.

- Keep relevant documents. If you are unsure whether a document is needed, ask your investigator. By law, employers are required to keep certain documents for a set period of time.

EEOC will:

- be available to answer questions about the investigation.
- respond to inquiries about the status of the investigation, including the rights and responsibilities of the parties.
- allow the organization to respond to the allegations.
- conduct a timely investigation.
- inform the organization of the outcome of the investigation.

Once the investigator has completed the investigation, EEOC will make a determination on the merits of the charge.

- If EEOC is unable to conclude that there is reasonable cause to believe that discrimination occurred, the charging party will be issued a notice called a **Dismissal and Notice of Rights.** This notice informs the charging party that s/he has the right to file a lawsuit in federal court within 90 days from the date of its receipt. The employer will also receive a copy of this notice.
- If EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a **Letter of Determination** stating that there is reason to believe that discrimination occurred and inviting the parties to join the agency in seeking to resolve the charge through an informal process known as **conciliation**.
- When conciliation does not succeed in resolving the charge, EEOC has the authority to enforce violations of its statutes by filing a lawsuit in federal court. If the EEOC decides not to litigate, the charging party will receive a **Notice of Right to Sue** and may file a lawsuit in federal court within 90 days.

U.S. Equal Employment Opportunity Commission

About EEOC's Digital Charge System

Each year, more than 150,000 individuals contact EEOC with inquiries about discrimination and EEOC receives about 90,000 charges per year, making its charge system the agency's most common interaction with the public. To improve customer service, ease the administrative burden on staff, and reduce the use of paper submissions and files, the EEOC is developing online applications for use by the public. The first application for the private sector charge system is Phase I of a Digital Charge System, which was piloted beginning in May 2015 in eleven EEOC offices (Charlotte, Greensboro, Greenville, Norfolk, Raleigh, Richmond and San Francisco, followed by Denver, Phoenix, Detroit and Indianapolis.

As of January 1, 2016, all of EEOC's 53 offices have implemented Phase I of the Digital Charge System.

Key Benefits to the Public and to EEOC of a Digital Charge System

- Increases responsiveness to our customers by allowing them to upload and download documents, to communicate online with EEOC, and to provide more detailed info available thru online resources and links to eeoc.gov;
- Streamlines the enforcement system with dates triggering messages, reminders and action steps;
- Saves resources, including staff time, paper and money using digital documents and communications rather than copying, mailing, phone calls;
- Provides improved management of workflow, and increased accountability and coordination;
- Protects integrity, security, and storage of documents in online system.

Phase I of the Digital Charge System

The first phase of this system allows employers against whom a charge of employment discrimination has been filed to interact online with the EEOC thru a Respondent Portal. The application notifies the respondent by email that a charge has been filed, and through a secure online portal (EEOC Respondent Portal), allows the respondent to:

- View and download the charge;
- Review an invitation to mediate and respond to it;
- Submit a Position Statement and attachments to EEOC;
- Submit a response to a Request for Information to EEOC; and
- Provide/verify respondent contact information, including the designation of a legal representative.

Phase II in 2016

In 2016, EEOC plans to expand the Digital Charge System to add a secure portal for individuals who file a charge of employment discrimination, and to enhance the communications and documents transmitted through the system for both charging parties and respondents.

Effective Position Statements

When a charge of discrimination is filed with EEOC, the agency has the authority to investigate to determine whether there is a reasonable cause to believe discrimination occurred. EEOC will ask both the Charging Party and the Respondent to provide information as part of its investigation. EEOC may request specific documents, information or interviews from your organization concerning the charge. In most cases, EEOC requests that the Respondent submit a statement of its position (known as a "position statement") with supporting documentation. The purpose of this document is to explain how Respondents can draft effective position statements.

What should a position statement include?

Fact-Based Position Statement
At a minimum, it should include **specific, factual** responses to every allegation of the charge, as well as any other facts which you deem relevant for EEOC's consideration. The position statement should clearly explain the Respondent's version of the facts and identify the specific documents and witnesses supporting its position. A well drafted position statement can help EEOC accelerate the investigation and limit requests for additional information.

EEOC also requests that you submit all documentary evidence you believe is responsive to the allegations of the charge. If you submit only an advocacy statement, unsupported by documentary evidence, EEOC may conclude that Respondent has no evidence to support its defense to the allegations of the charge.

Keep the following points in mind as you prepare the response to the charge:

- Address each alleged discriminatory act and your position regarding it and provide copies of documents supporting your position and/or version of the events.

- Provide a description of the organization; include the organization's legal name and address, the name, address, title, telephone number and email address of the person responsible for responding to the charge, the primary nature of the business, and the number of employees. A staffing or organizational chart is also useful in helping to focus the investigation.

- Provide any applicable practices, policies or procedures applicable to the allegations in the charge.

- Identify any individuals other than the Charging Party who have been similarly affected by these practices, policies or procedures; describe the circumstances in which the practices, policies, or procedures have been applied.
- Explain why individuals who were in a similar situation to the Charging Party were not similarly affected.

- Identify official(s) who made decisions or took action relating to the matter(s) raised in the charge.

- Be specific about date(s), action(s) and location(s) applicable to this case.

- Provide internal investigations of the alleged incidents or grievance hearing reports.

- **Inform EEOC if the matter has been resolved or can be resolved; if it can be resolved, please indicate your proposal for resolution.**

An effective position statement is clear, concise, complete and responsive. A position statement that simply denies the allegations without providing your position or supporting information is not sufficient.

EEOC may also release your position statement and non-confidential attachments to Charging Parties and their representatives and allow them to respond to enable the EEOC to assess the credibility of the information provided by both parties. It is in the Respondent's interest to provide an effective position statement that focuses on the facts. EEOC will not release the Charging Party's response, if any, to the Respondent.

Examples of Supporting Documentary Evidence
Some ***examples*** of the types of documentary evidence which may be submitted in support of a position statement are:

> **Example 1:** Charging Party alleges sexual harassment:
> You may submit statements or affidavits from witnesses with direct knowledge of the alleged events and/or from the alleged harasser responding to the CP's allegations.
>
> **Example 2:** Charging Party alleges racial discrimination in pay:
> You may submit payroll records showing that the compensation of all employees in positions comparable to Charging Party, and information regarding their racial category, criteria for setting pay, and how each employee's pay was determined.
>
> **Example 3:** Charging Party alleges she was fired because of her age (55):
> You may submit personnel records documenting the reasons for her termination.
>
> **Example 4:** Charging Party alleges termination because of pregnancy:
> You may submit documentation showing your reason for terminating CP.

Segregate Confidential Information into Separately Marked Attachments
The position statement should only refer to, but not identify information that the Respondent asserts is sensitive medical information, or confidential commercial or financial information. If Respondent relies on confidential medical or commercial information in its position statement, it should provide such information in separate attachments to the position statement labeled "Sensitive Medical Information," "Confidential Commercial or Financial Information," or "Trade Secret Information" as applicable. Provide an explanation justifying the confidential nature of the information contained in the attachments. Medical information about the Charging Party shall not be deemed sensitive or confidential medical information in relation to the investigation.

Respondent should segregate the following information into separate attachments and designate them as follows:

- Sensitive medical information (except for the Charging Party's medical info).
- Social Security Numbers.
- Confidential commercial or financial information.
- Trade secrets information.
- Non-relevant personally identifiable information of witnesses, comparators or third parties, for example, social security numbers, dates of birth in non-age cases, home addresses and personal phone numbers, etc.

- Any reference to other charges filed against the Respondent or to other charging parties, unless the other charges are by the Charging Party.

EEOC will review attachments designated as confidential and consider the justification provided, as the agency will not condone blanket or unsupported assertions of confidentiality.

Provide Your Response by the Due Date
Provide your response within the stated deadline. A brief extension of time **may** be allowed in particular cases, but only when it is clear that you are working with due diligence to supply all of the necessary information. Evidence of due diligence would include a partial submission of information related to the allegations in the charge.

Requests for an Extension:
If Respondent believes it requires additional time to respond, it must, at the *earliest possible time* in advance of the due date, make a written request for extension, explain why an extension is necessary, and specify the amount of additional time needed to reply. Submitting a written request for extension of time which has not been granted does not relieve Respondent of complying with the deadline.

Upload the Position Statement and Attachments into the Respondent Portal
You can upload your position statement and attachments into the Respondent Portal using the **+ Upload Documents** button. Select the "Position Statement" Document Type and click the **Save Upload** button to send the Position Statement and attachments to EEOC. Once the Position Statement has been submitted, you will not be able to retract it via the Portal.

If you do not submit a position statement or respond to EEOC's requests for information, the EEOC may proceed directly to a determination on the merits of the charge based on the information at its disposal or subpoena specific information related to the allegations in the charge.

U.S. Equal Employment Opportunity Commission

Resolving a Charge

EEOC offers employers many opportunities to resolve charges of discrimination. Successfully resolving the case through one of these voluntary processes may save you time, effort and money. Methods of resolution include mediation, settlement and conciliation.

Mediation

EEOC has greatly expanded its mediation program. The program is free, quick, voluntary and confidential. If mediation is successful, there is no investigation.

If the charge filed against your company is eligible for mediation, you will be invited to take part in the mediation process. If mediation is unsuccessful, the charge is referred for investigation.

Advantages of Mediation

1. EEOC's mediation program is **free**.
2. Mediation is **efficient**. The process is initiated before an investigation begins and most mediations are completed in one session, which usually lasts for one to five hours.
3. The average processing time for mediation is **84 days**.
4. The mediation program is completely **voluntary**.
5. Successful mediation results in the **closure of the charge** filed with EEOC. If mediation is unsuccessful, the charge is referred for investigation.
6. Mediators are **neutral** third parties who have no interest in the outcome of the mediation.
7. Mediation is a **confidential** process. The sessions are not tape-recorded or transcribed. Mediator notes taken during the mediation are discarded. Information learned during the mediation can not be used during an EEOC investigation if the mediation is unsuccessful.
8. Mediation is an **informal** process. The goal of mediation is not fact finding. The purpose is to discuss the charge and reach an agreement that is satisfactory to all parties.
9. Settlement agreements secured during mediation **are not admissions by the employer** of any violation of laws enforced by the EEOC.
10. Mediation **avoids lengthy and unnecessary litigation**.
11. Settlement agreements secured during mediation are **enforceable**.
12. The overwhelming majority of employers and charging parties participating in EEOC mediation program are **satisfied with the process and would use it again**.
13. Mediation can help the parties understand **why the employment relationship broke down**.
14. Mediation can help the parties identify ways to **repair an ongoing relationship**.

To learn more about EEOC's mediation program, and how to participate in it, visit the mediation section of the website.

Settlement

Charges of discrimination may be settled at any time during the investigation. EEOC investigators are experienced in working with the parties to reach satisfactory settlements. You should contact the investigator if you are interested in resolving your charge through settlement.

Advantages of Settlement

1. **Voluntary** settlement efforts can be pursued at any time during the investigation, but settling a charge early may save you the time and effort associated with investigations.
2. Settlement is an **informal** process. The goal of settlement is to reach an agreement that is satisfactory to all parties.
3. There is no **admission of liability**.
4. If the parties, including EEOC, reach a voluntary agreement, the charge will be **dismissed**.

5. Settlement agreements are **enforceable**.
6. Settlement **avoids lengthy and unnecessary litigation**.

Conciliation

EEOC is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion." See 42 U.S.C. 2000e-5. After the parties have been informed by letter that the evidence gathered during the investigation establishes that there is "reasonable cause" to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions. During conciliation, your investigator will work with you and the Charging Party to develop an appropriate remedy for the discrimination. We encourage you to take advantage of this final opportunity to resolve the charge prior to EEOC considering the matter for litigation.

Advantages of Conciliation

1. Conciliation is a **voluntary** process.
2. Conciliation discussions are negotiations and **counter-offers may be presented**.
3. Conciliation offers the parties a final **opportunity to resolve the charge informally** - - after an investigation has been conducted, but before a litigation decision has been reached.
4. Conciliation agreements **remove the uncertainty, cost and animosity surrounding litigation**.

U.S. Equal Employment Opportunity Commission

Mediation

Mediation is a *fair* and *efficient* process to help you resolve your employment disputes and reach an agreement. A neutral mediator assists you in reaching a voluntary, negotiated agreement. Choosing mediation to resolve employment discrimination disputes promotes a better work environment, reduces costs and works for the employer *and* the employee.

- EEOC's Ten Reasons to Mediate *(Watch the video!)*
- Facts About Mediation
- Questions and Answers - Mediation
- Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)
- Questions and Answers for Parties to Mediation: Mediation and the Americans with Disabilities Act (ADA)
- EEOC's ADR Policy Statement
- History of EEOC Mediation Program
- Mediation Contact List
- Studies of the Mediation Program
- Universal Agreement to Mediate

A few satisfied customers ...

"Once the employer gets past the myth of "If we didn't do anything wrong, we shouldn't go to mediation" and decides to participate, the real issues in the dispute become clear. Through mediation, we have had the opportunity to proactively resolve issues and avoid potential charges in the future. We have seen the number of charges filed with EEOC against us actually decline. We believe that our participating in mediation and listening to employees' concerns has contributed to that decline."
Donna M. Gwin
Director of Human Resources
Eastern Division
Safeway Inc.

"As an employer's attorney, I routinely recommend mediation to my clients. In mediation, you can build a sense of what the issues are, learn the problems, explore possible options for resolution, and make informed decisions whether or not resolving at that time or moving on is the best outcome for that matter. It makes both business and economic sense from the employer's perspective."
Charles C. Warner, Esq.
Porter Wright Morris & Arthur LLP

"Regardless of the issue or whether it has merit under Title VII, if it is draining resources, weighing on the mind of the employee, or having a negative impact on productivity, then getting the issue out on the table, mediating it and resolving it is often the smartest and most expeditious way to ensure workforce effectiveness."
Linda I. Workman
Vice President
Workforce Effectiveness
ConAgra Foods, Inc.

"Hopkins is striving to be an employer of choice. We think that participating in EEOC's mediation program moves us that much closer to meeting that goal. . . .We learned that settlement is not always about money. Sometimes there are non- economic ways to settle a case that may be important to the charging party and the respondent."
Laurice Royal, Esq.
Johns Hopkins Health System Corporation

For more information, see
EEOC Mediation Program and the Workplace Benefits of Mediation
EEOC Commission Meeting of December 2, 2003, Washington, D.C.

U.S. Equal Employment Opportunity Commission

10 Reasons to Mediate

00:00 00:00

The video *10 Reasons to Mediate* introduces businesses to the Equal Employment Opportunity Commission's (EEOC) National Mediation Program. Mediation is usually a preferable alternative to a traditional EEOC investigation and to enforcement and litigation steps that may follow. Mediation allows the parties involved in a charge of discrimination to resolve their differences quickly and amicably without a determination by the EEOC on the merits of the case.

Hear from other employers who already have participated in the EEOC's voluntary National Mediation Program and believe that you should, too, if a charge is filed against your company. We encourage you to watch this video, to share it with colleagues in your community, and contact us with any questions you may have.

How to watch the video off-line

You can download a CD-ROM disk image and create your own CD-ROM (please refer to your CD-ROM

What are the 10 Reasons?

1. **Mediation is free.**
   EEOC's National Mediation Program is available at no cost to the parties.
2. **Mediation is fair and neutral.**
   Parties have an equal say in the process and they, not the mediator, decide the terms of the settlement. There is no determination of guilt or innocence in the process.
3. **Mediation saves time and money.**
   Mediation usually occurs early in the charge process, and many mediations are completed in one meeting. Legal or other representation is optional but not required.
4. **Mediation is confidential.**

writing software's documentation for instructions). The CD-ROM, which you are free to copy and distribute, includes the video and its own video player software, and will run automatically when placed in the CD drive of a computer running Windows. The video runs 14 minutes and is open captioned.

- Download disk image

You can also download the video file without the player, if you want to watch the video without creating a CD-ROM. This is the better option if you want to email the video or place it on an intranet site.

- Download video

Order a CD-ROM

For a free copy of the "*10 Reasons to Mediate*" video on compact disc, please send an e-mail request to MediationCD@eeoc.gov or call (202) 663-4823.

All parties sign a confidentiality agreement. Information disclosed during mediation will not be revealed to anyone, including EEOC investigative or legal staff.

5. **Mediation avoids litigation.**

   Mediation costs less than a lawsuit and avoids the uncertainty of a judicial outcome.

6. **Mediation fosters cooperation.**

   Mediation fosters a problem-solving approach to complaints and workplace disruptions are reduced. With an investigation, even if the charge is dismissed by EEOC, underlying problems may remain, affecting others in the workforce.

7. **Mediation improves communication.**

   Mediation provides a neutral and confidential setting in which the parties can openly discuss their views on the underlying dispute. Enhanced communication can lead to mutually satisfactory resolutions.

8. **Mediation helps to discover the real issues in your workplace.**

   Parties share information, which can lead to a better understanding of issues affecting the workplace.

9. **Mediation allows you to design your own solution.**

   A neutral third party assists the parties in reaching a voluntary, mutually beneficial resolution. Mediation can resolve all issues important to the parties, not just the underlying legal dispute.

10. **With mediation, everyone wins.**

    An independent survey showed 96% of all respondents and 91% of all charging parties who used mediation would use it again.

Search... GO

FAQs

+ How is Registered Apprenticeship different from other types of work-based training?

+ What is the Human Rights Act?

+ What are the bases of discrimination?

+ How long do I have to file a complaint?

+ Is harassment covered under the Human Rights Act?

+ Does the Human Rights Bureau represent me or provide me an attorney?

+ What does it cost to file a complaint?

+ What if I want to file my charge with the federal Equal Employment Opportunity Commission?

− What is the ADR Program?

The Human Rights Bureau has adopted the Alternative Dispute Resolution (ADR) Program to attempt to resolve discrimination issues through mediation/conciliation. A resolution of a complaint through mediation is less costly because it can settle a case in a matter of weeks as opposed to a lengthy investigation. The ADR program is strictly voluntary and all parties must be willing to participate.

+ How may I learn about discrimination?

1 2 3

Categories

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  - Youth 7
  - Wages and Work Hours 2
  - Apprenticeship 8

Resource Links

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Equal Pay

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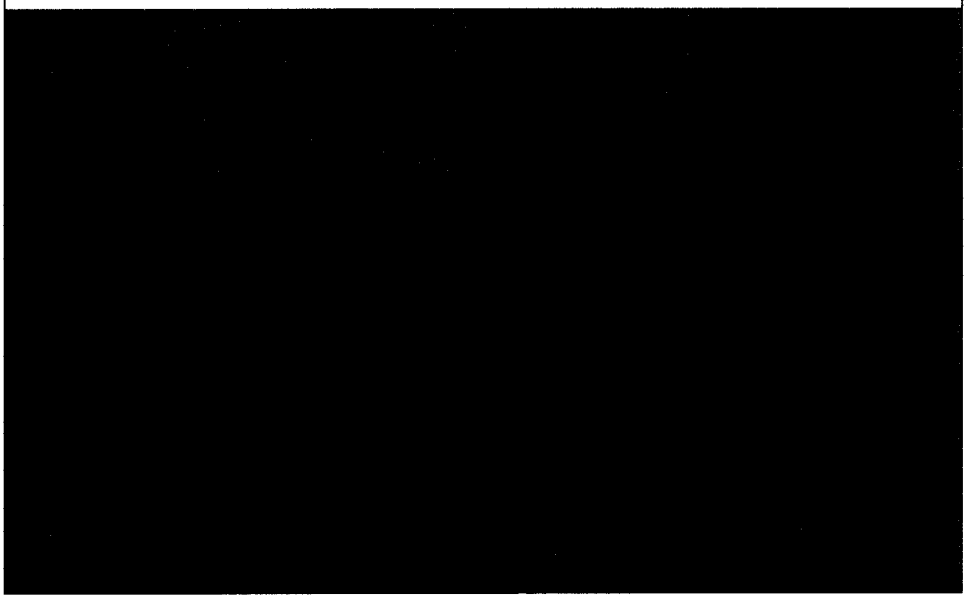


Agenda

- The Equal Pay Movement
- How the federal and state governments are working to close the "pay gap"
  - Proposed EEO-1 Pay Data Reports
  - Growing Trend of Aggressive State Laws
- Best practices for mitigating the risk of pay discrimination claims

Why Are We Talking About This?

- There has been a **substantial increase in pay discrimination claims being filed**
  - Greater employee awareness
  - "Tack on" claims from plaintiffs' attorneys seeking attorneys' fees
  - EEOC added pay discrimination questions to charge intake
  - OFCCP focusing on compensation in audits
- Claims are hitting **employers of all sizes in all industries**
- Which positions are most at risk of big $$ claims?
  - Highly compensated positions
  - Highly populated positions

It's all about the "Pay Gap"

For every $1.00 paid to a man, how much is paid to a . . .

Group	Nationwide
Woman	80¢
African-American Woman	62¢
Hispanic Woman	54¢

The Pay Gap Has Become "Water Cooler Talk"

- Celebrities in Hollywood & sports stars are speaking out about equal pay
  - Patricia Arquette
  - Jennifer Lawrence
  - Amy Schumer
  - Hugh Jackman
  - Cast of *Big Bang Theory*
  - Emma Stone
  - Robin Wright
  - James Nesbitt
  - U.S. Women's Hockey Team
- Politicians are hearing the call from constituents and are speaking out against pay discrimination
  - Top EEO initiative of Obama Administration
  - Major tenant of Hillary Clinton's campaign

What Does President Trump Say?

THEN

- "Women should have absolute access to capital .... If they do the same job, they should get the same pay."
- – *MSNBC's Morning Joe*, August 2016

NOW

"In his first few months in office, President Trump revoked Obama's Fair Pay and Safe Workplaces Executive Order that required companies with federal contracts to comply with identified labor and civil rights laws, . . . and infuse transparency into salary reporting."

– *Fortune*, 9/1/17

New, Aggressive Tools Attack the "Gap"

- Federal government, many states, academics, pay experts, women's and civil rights groups coordinating to close the gap
  - Aggressive State Equal Pay Laws
  - Top priorities of EEOC & OFCCP
  - Bans on Asking Applicants for Salary History

States Taking Action

- Many states have heard the call for stricter equal pay laws and taken action to "close the gap"
- 15+ states with new or proposed equal pay legislation
- **California Fair Pay Act** – gender effective 1/1/16; race/Ethnicity effective 1/1/17
  - Changes pay groups from "similarly situated" (U.S. Equal Pay Act) to "substantially similar," making it far easier for employees to compare themselves to others
  - Limits employers' ability to explain pay disparities
  - Incentivizes plaintiffs' attorneys to "tack on" pay discrimination to other cases by providing attorneys' fees

Some States Offering Incentive to Proactively Analyze Pay

- **Massachusetts Equal Pay Act**, signed 8/1/16
  - Broad groups based on "comparable work" (similar standard as in California)
  - Employers who do "reasonable" pay analysis can assert **affirmative defense** to pay discrimination claims for **3 years**
- **New Mexico Fair Pay for Women Act (2013)** prohibits wage discrimination based upon an employee's sex. Proof the employer's intent to discriminate is not required. Exceptions are provided for wage differentials based upon seniority or merit systems, or a system that measures earnings by quality or quantity of production.

Some States Offering Incentive to Proactively Analyze Pay

- **Puerto Rico Equal Pay Act**, signed 3/8/17 (new!)
  - prohibits pay discrimination based on sex among employees performing comparable job functions or duties that require the same skill, effort or responsibilities under similar working conditions. Exceptions are recognized for: (1) *bona fide* seniority or merit-based systems; (2) compensation based on quantity or quality of production, sales or profits; (3) differing levels of education, training or experience to the extent these factors are reasonably related to the specific job; and (4) any other reasonable factor that is not related to the person's sex.
  - **Safe harbor against liquidated damages** for employers who did voluntary "self-evaluation" within the preceding year and made reasonable progress to eliminate sex-based salary differences.

EEOC Enforcement Trends

- Equal pay continues to be an enforcement priority for the EEOC in its Strategic Enforcement Plan for 2017 - 2021
- Equal Pay Act claims represented only 1.2% of the total charges received by the EEOC in FY 2016.
- These claims nonetheless resulted in $8.1 million in monetary benefits to equal pay claimants.

OFCCP Enforcement Trends

- Agency takes deep dives into pay data in every audit
- OFCCP often requires:
  - Interviews with compensation managers
  - Information from personnel files about experience, education, etc.
  - Data "snapshots" from multiple years to evaluate trends
- Recent high dollar settlements:
  - Legal business and information company settled with OFCCP for more than $1.2 million for sex bias claims
  - Global food manufacturer settled with OFCCP for $550K for denying production jobs to over 400 female applicants

It's Not Just the U.S. – Growing International Obligations

- **UK** – companies with 250+ employees subject to compulsory gender reporting by April 2018
- **Germany** – proposed Equal Pay Act
  - Companies with 200+ employees have to document pay gap
  - Employees will be entitled to be informed by the employer about the salary of co-workers in similar positions
  - Companies with 500+ employees must conduct pay equity review at least every 5 years, but it is not a legal, binding requirement.
- **Sweden** – In 2008, the country signed the Swedish Discrimination Act, which requires companies of 25 or more employees to issue surveys every year analyzing pay differences between men and women. Companies with big differences between genders who don't take steps to close the gap risk paying fines.

New EEO-1 Pay Data Reporting - SUSPENDED

- Proposed new requirements included:
  - **Pay data** – W-2 earnings
  - "**Hours worked**" – FLSA definition for overtime
- Applied to all employers, including federal contractors and subcontractors, with 100 or more employees
- Proposed first report date - **March 2018 – suspended!**
- Employers must file prior EEO-1 form by March 2018

Objections leading to demise of new EEO-1 form

- Increased reporting burden by approximately 1,933%
  - From 180 cells to 3,600 cells per establishment
- Employers do not house W-2 earnings, hours worked, job, race/ethnicity and gender data in same system
  - Would need data from HRIS, payroll & timekeeping systems combined
- EEOC expected that employers would write software programs to aggregate data across systems

- EEOC's new Acting-Chair Victoria Lipnic voted against the pay data reporting rule
  - Has stated she seriously doubted that EEOC's original burden estimates were accurate
- What could EEOC do?
  - Keep rule "as is"
  - Rescind rule entirely
  - Change rule to lessen burden
- President Trump's two recent EEOC nominees, Janet Dhillon and Daniel Gade, have stated they will rework and replace the suspended EEO-1 reporting requirements in a timely manner.

One other possibility...

- Republican-controlled Congress could pass legislation blocking or defunding pay data collection
- This could actually lead to a worse situation for employers:
  - If the federal government signals it is backing off the equal pay, more states will likely enact their own laws
  - State agencies and courts are less predictable than the federal government; more plaintiff friendly
  - Multi-state employers would need to account for a patchwork of different laws across the country

Most states have equal pay laws or apply their antidiscrimination laws to pay disparities based upon sex.

New State Laws Make it Easier for Employees to Bring Successful Claims

- Broader definitions of who can be compared against whom for pay purposes
- Requiring pay differences be based on job-related factors
- Requiring employers to demonstrate explanations for pay differences with consistent data
- Authorizing attorneys' fees for successful claims

"Pay Transparency"

- Unlawful to take adverse action against employee for asking or discussing compensation
- Goal is to bring pay "out in the open"
- Concept is rooted in *Lilly Ledbetter* case
- Many states and municipalities are enacting
- National Labor Relations Act also prohibits retaliation against employees for discussing terms or conditions of employment

Prohibition on Asking Applicants for Salary History

- Increasingly, states and cities are banning employers from requesting applicants' salary history
- Studies show that starting salary is the biggest driver of pay differences
- **Basing starting pay on prior pay can *perpetuate* the "pay gap"**
- **Massachusetts** – first state to ban asking for salary history – effective July 2018
- **CA** – quickly amended CFPA to say salary history cannot, by itself, explain pay disparity

Other Jurisdictions That Have Passed or Proposed Similar Bans on Asking for Salary History

Passed Salary History Ban

- Philadelphia
- NY – applies to state entities
- NYC – applies to city agencies

Proposed Salary History Ban

- Los Angeles
- PA
- NJ
- Texas
- DC
- NYC
- Federal Government
- CA

Be Wary of Relying on "Market Conditions"

- *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)
  - Not a defense under the Equal Pay Act that an employer pays women less than men "simply because men would not work at the low rates paid women" and market forces therefore dictated lower wages for women.
  - Even if economic conditions might explain pay differential in some circumstances, employer must show how cost-saving measures caused the plaintiff to be paid less than their comparators.
- Can still argue had to pay someone more because of current market demands
  - Should even it out over time by limiting raises for overpaid and giving larger raises to underpaid

Best Practices for Mitigating Risk of Pay Discrimination Claims

- **Don't base starting salary on prior salary**
  - Even if still permissible to base decisions on prior salary, chances are doing so could create pay differences that are hard to defend
- **Limit discretion when it comes to pay decisions**
  - The government sees "discretion" as being synonymous with "discrimination"
  - Make sure there are checks and balances
  - Provide ranges or bands to help control discretion
- **Avoid "pay for performance"**
  - Performance evaluations are inherently subjective

Best Practices for Mitigating Risk of Pay Discrimination Claims

- **Make sure starting salary decisions are based on job related factors**
  - Job related factors generally include experience, education, skills, certifications, *etc.*
  - Consider creating list of eligible factors for different positions
- **Document bases for pay decisions**
  - Require hiring managers to put a note in the employee file
  - Particularly true when paying above or below a set range
- **Consider who should be compared against whom for pay purposes, and evaluate job titles to make it clear**

Best Practices for Mitigating Risk of Pay Discrimination Claims

- THE BIG ONE – <u>Conduct Pay Equity Analyses</u>
  - Find the pay gaps in your workforce and make sure they are defensible
  - Will you be able to demonstrate why pay gaps are justified?
  - Take care in making equity adjustments
    - Best practice is to use regular merit increase cycle as "cover"
    - Consider whether its better to give one person a big adjustment or multiple people small adjustments

Make Sure Pay Analyses Are Protected By The Attorney-Client Privilege!

- In this day and age, employers ***need*** to conduct proactive pay equity analyses
- Unfortunately, the government and private plaintiffs' attorneys know this and are demanding copies of analyses in unrelated litigation
- Nothing worse than handing over a pay analysis to your adversary – any problems not fixed could now be "willful" or intentional
- **Protect your analyses from disclosure by getting in house or outside counsel involved from the start!**

The Sliding Scale of Privilege

Not Privileged **Argument for Privilege** **Privileged**

No Attorney Involvement

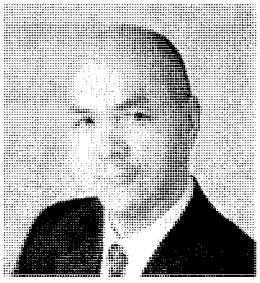
In-House Counsel (on surface)

In-House Counsel (substance)

Outside Counsel (on surface)

Outside Counsel (substance)

Questions?



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NOTES

Conflicts of Interest and Ethical Considerations

16-107. Conflict of interest; current clients.

A. **Representation involving concurrent conflict of interest.** Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

B. **Permissible representation when concurrent conflict exists.** Notwithstanding the existence of a concurrent conflict of interest under Paragraph A of this rule, a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, *see* Rule 16-108 NMRA of the Rules of Professional Conduct. For former client conflicts of interest, *see* Rule 16-109 NMRA of the Rules of Professional Conduct. For conflicts of interest involving prospective clients, *see* Rule 16-118 NMRA of the Rules of Professional Conduct. For definitions of "confirmed in writing" and "informed consent", *see* Paragraphs B and E of Terminology of the Rules of Professional Conduct.

[2] Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under Paragraph A and obtain their informed consent, confirmed in writing. The clients affected under Paragraph A include both of the clients referred to in Subparagraph (1) of Paragraph A and the one or more clients whose representation might be materially limited under Subparagraph (2) of Paragraph A.

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of Paragraph B. To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. *See also* Committee Commentary to Rule 16-501 NMRA of the Rules of Professional Conduct. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, *see* Committee Commentary to Rule 16-103 NMRA and Scope of the Rules of Professional Conduct.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of Paragraph B. *See* Rule 16-116 NMRA of the Rules of Professional Conduct. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to

represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* Rule 16-109 NMRA of the Rules of Professional Conduct.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rule 16-116 NMRA of the Rules of Professional Conduct. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct.

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 16-109 NMRA of the Rules of Professional Conduct or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. *See* Rule 16-108 NMRA of the Rules of Professional Conduct for specific rules pertaining to a

number of personal interest conflicts, including business transactions with clients. *See also* Rule 16-110 NMRA of the Rules of Professional Conduct (personal interest conflicts under Rule 16-107 NMRA of the Rules of Professional Conduct ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. *See* Rule 16-110 NMRA of the Rules of Professional Conduct.

[12] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* Paragraph F of Rule 16-108NMRA of the Rules of Professional Conduct. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of Paragraph B before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in Paragraph B, some conflicts are non-consentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under Subparagraph (1) of Paragraph B, representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. *See* Rule 16-101 NMRA (Competence) and Rule 16-103 NMRA (Diligence) of the Rules of Professional Conduct.

[16] Subparagraph (2) of Paragraph B describes conflicts that are non-consentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Subparagraph (3) of Paragraph B describes conflicts that are non-consentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Paragraph M of Terminology of the Rules of Professional Conduct), such representation may be precluded by Subparagraph (1) of Paragraph B of this rule.

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. *See* Paragraph E of Terminology of the Rules of Professional Conduct (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. *See* Special Considerations in Common Representation, below.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph B requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. *See* Paragraph B of Terminology of the Rules of Professional Conduct; *see also* Paragraph N of Terminology of the Rules of Professional Conduct (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. *See* Paragraph B of Terminology of the Rules of Professional Conduct. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of Paragraph B. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict non-consentable under Paragraph B.

Conflicts in Litigation

[23] Subparagraph (3) of Paragraph B prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by Subparagraph (2) of Paragraph A. A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of Paragraph B are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying Subparagraph (1) of Paragraph A of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Non-litigation Conflicts

[26] Conflicts of interest under Subparagraphs (1) and (2) of Paragraph A arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, *see* Committee Commentary above, Identifying Conflicts of Interest: Directly Adverse. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. *Id.*

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 16-104 NMRA of the Rules of Professional Conduct. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Paragraph C of Rule 16-102NMRA of the Rules of Professional Conduct.

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 16-109 NMRA of the Rules of Professional Conduct concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 16-116 NMRA of the Rules of Professional Conduct.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Paragraph A of Rule 16-113 NMRA of the Rules of Professional Conduct. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the

lawyer's resignation from the board and the possibility of the corporation obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-108. Conflict of interest; current clients; specific rules.

A. **Business transactions with or adverse to client.** A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

B. **Use of information limited.** A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

C. **Client gifts.** A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

D. **Literary or media rights.** Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

E. **Financial assistance.** A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

F. **Compensation from third party.** A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 16-106 NMRA of the Rules of Professional Conduct.

G. **Representation of two or more clients.** A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

H. **Prospective malpractice liability limitation.** A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

I. **Proprietary interest in cause of action.** A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

J. **Client-lawyer sexual relationships.** A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

K. **Lawyer association.** While lawyers are associated in a firm, a prohibition in the foregoing Paragraphs A through I that applies to any one of them shall apply to all of them.

[As amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 16-8300-005, effective December 31, 2016.]

Committee commentary. —

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of Paragraph A must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. *See* Rule 16-507 NMRA. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 16-105 NMRA, although its requirements must be met when the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in Paragraph A are unnecessary and impracticable.

[2] Paragraph (A)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (A)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (A)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and

should explain why the advice of independent legal counsel is desirable. *See* Rule 16-100(E) NMRA (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of Paragraph A, but also with the requirements of Rule 16-107 NMRA. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 16-107 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, Paragraph (A)(2) of this rule is inapplicable, and the Paragraph (A)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as Paragraph (A)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph B applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph B prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these rules. *See* Rules 16-102(D), 16-106, 16-109(C), 16-303, 16-401(B), 16-801, and 16-803 NMRA.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, Paragraph C does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in Paragraph C.

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this rule is where the client is a relative of the donee.

[8] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 16-107 NMRA when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph D does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 16-105 NMRA and Paragraphs A and I of this rule.

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. *See also* Rule 16-504(C) NMRA (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 16-107 NMRA. The lawyer must also conform to the requirements of Rule 16-106 NMRA concerning confidentiality. Under Rule 16-107(A), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 16-107(B), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under that paragraph. Under Rule 16-107(B), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 16-107 NMRA, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 16-102(A) NMRA protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both of those rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. *See also* Rule 16-100(E) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with

any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 16-102 NMRA that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph I states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like Paragraph E, the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these rules. The exception for certain advances of the costs of litigation is set forth in Paragraph E. In addition, Paragraph I sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of Paragraph A. Contracts for contingent fees in civil cases are governed by Rule 16-105 NMRA.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. *See* Rule 16-107(A)(2) NMRA.

[19] When the client is an organization, Paragraph J of this rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under Paragraph K, a prohibition on conduct by an individual lawyer in Paragraphs A through I also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with Paragraph A, even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in Paragraph J is personal and is not applied to associated lawyers.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008; as amended by Supreme Court Order No. 16-8300-005, effective December 31, 2016.]

16-109. Duties to former clients.

A. **Subsequent representation.** A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

B. **Subsequent representation; former law firm.** A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct that is material to the matter, unless the former client gives informed consent, confirmed in writing.

C. **Former representation.** A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. Current and former government lawyers must comply with this rule to the extent required by Rule 16-111 NMRA of the Rules of Professional Conduct.

[2] The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in

seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing the neighbors seeking to oppose rezoning of the property on the basis of environmental considerations. However, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph B operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct. Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. *See* Paragraph B of Rule 16-110 NMRA of the Rules of Professional Conduct for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of Paragraph B of this rule depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs. It should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients. In the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve the confidentiality of information about a client formerly represented. *See* Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct.

[8] Paragraph C of this rule provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under Paragraphs A and B. *See* Paragraph E of Terminology of the Rules of Professional Conduct. With regard to the

effectiveness of an advance waiver, *see* Committee Commentary to Rule 16-107 NMRA of the Rules of Professional Conduct. With regard to disqualification of a firm with which a lawyer is or was formerly associated, *see* Rule 16-110 NMRA of the Rules of Professional Conduct.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

16-110. Imputation of conflicts of interest; general rule.

A. **Firm association.** While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 16-107 or 16-109 NMRA of the Rules of Professional Conduct, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

B. **Terminated associations.** When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rule 16-106 NMRA and Rule 16-109(C) NMRA of the Rules of Professional Conduct that is material to the matter.

C. **Subsequent firm associations; screening.** When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter in which that lawyer is disqualified under Rule 16-109(A) or (B) NMRA of the Rules of Professional Conduct unless:

(1) the newly associated lawyer has no information protected by Rule 16-106 or 16-109 NMRA of the Rules of Professional Conduct that is material to the matter; or

(2) the newly associated lawyer did not have a substantial role in the matter, is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.

D. **Waiver of disqualification.** A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 16-107 NMRA of the Rules of Professional Conduct.

E. **Other rules.** The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 16-111 NMRA of the Rules of Professional Conduct, and the disqualification of lawyers associated in a firm with former judges, arbitrators, mediators or other third-party neutrals is governed by Rule 16-112 NMRA of the Rules of Professional Conduct.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008; as amended by Supreme Court Order No. 15-8300-007, effective December 31, 2015.]

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee commentary. —

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, or lawyers employed in a legal services organization or the legal department of a corporation or other organization. *See* Paragraph C of Terminology of the Rules of Professional Conduct. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Committee commentary to Terminology of the Rules of Professional Conduct.

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in Paragraph A gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph A operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 16-109(B) and 16-110(B) NMRA of the Rules of Professional Conduct.

[3] Paragraph A of this rule does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case was owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule stated in Paragraph A also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary. Nor does Paragraph A prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect. *See* Paragraph K of Terminology of the Rules of Professional Conduct.

[5] Rule 16-110(B) NMRA of the Rules of Professional Conduct operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 16-107 NMRA of the Rules of Professional Conduct. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 16-106 and 16-109(C) NMRA of the Rules of Professional Conduct.

[6] Where the conditions of Paragraph C of this rule are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] A motion to disqualify under Subparagraph (C)(2) of this rule requires a determination as to whether the newly associated lawyer had a substantial role in the relevant matter. Because Paragraph C applies only to lawyers who would otherwise be disqualified under Rule 16-109 NMRA, the lawyer will have already been determined to have formerly represented a client in the same or a substantially related matter. When analyzing whether the former representation was in the same or a substantially related matter, the former client shall not be required to reveal confidential information learned by the lawyer. *See Leon, Ltd., v. Carver*, 1986-NMSC-015, ¶ 9, 104 N.M. 29. *See also* Rule 16-109, Committee commentary ¶ 3. Confidential information must continue to be protected when determining whether a lawyer had a substantial role in a matter, so as not to undermine the protections of *Leon* and Rule 16-109. In particular, the former client shall not be required to reveal confidential information simply because the inquiry has shifted from Rule 16-109 to Rule 16-110 NMRA. Analysis under Subparagraph (C)(2) should thus begin with a rebuttable presumption that the lawyer had a substantial role in the matter at issue. This presumption can be overcome by a preponderance of non-confidential evidence showing that the lawyer did not, in fact, have a substantial role in the matter. Relevant non-confidential evidence may include redacted billing statements as well as other non-privileged documents or testimony. For further guidance *see Mercer v. Reynolds*, 2013-NMSC-002, 292 P.3d 466; *Living Cross Ambulance Serv., Inc., v. N.M. Pub. Regulation Comm'n*, 2014-NMSC- 036, ¶¶ 13-22, 338 P.3d 1258; *Bowers v. Ophthalmology Group*, 733 F.3d 647, 650-54 (6th Cir. 2013); *Koch v. Koch Industries*, 798 F. Supp. 1525, 1536-37, ¶¶ 15-16 (D. Kan. 1992); and Charles W. Wolfram, "Former-Client Conflicts," 10 *Geo. J. Legal Ethics* 677, 717-22, § VI(D) (1997).

[8] Requirements for screening procedures are stated in Paragraph K of Terminology of the Rules of Professional Conduct. Subparagraph (C)(2) of this rule does not prohibit the screened lawyer from

receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[10] Rule 16-110(D) NMRA of the Rules of Professional Conduct removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 16-107 NMRA of the Rules of Professional Conduct. The conditions stated in Rule 16-107require the lawyer to determine that the representation is not prohibited by Rule 16-107(B) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, *see* Committee commentary to Rule 16-107 NMRA of the Rules of Professional Conduct. For a definition of "informed consent," *see* Paragraph E of Terminology of the Rules of Professional Conduct.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 16-111(B) and (C) NMRA of the Rules of Professional Conduct, and is not governed by this rule. Under Rule 16-111(D) NMRA of the Rules of Professional Conduct, where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 16-108 NMRA of the Rules of Professional Conduct, Paragraph J of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008; as amended by Supreme Court Order No. 15-8300-007, effective December 31, 2015.]

16-113. Organization as client.

A. **Generally.** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

B. **Acting in best interest of organization.** If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to a higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

C. **Authority to reveal information.** Except as provided in Paragraph D of this rule, if:

(1) despite the lawyer's efforts in accordance with Paragraph B the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 16-106 NMRA of the Rules of Professional Conduct permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

D. **Exception to authority to reveal information.** Paragraph C of this rule shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

E. **Notice of discharge or withdrawal.** A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraphs B or C of this rule, or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

F. **Identity of client.** In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

G. **Personal representation of officer or employee.** A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 16-107 NMRA of the Rules of Professional Conduct. If the organization's consent to the dual representation is required by Rule 16-107 NMRA of the Rules of Professional Conduct, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[As amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. —

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Committee Commentary apply equally to unincorporated associations. "Other constituents" as used in this commentary means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 16-106 NMRA of the Rules of Professional Conduct. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 16-106 NMRA of the Rules of Professional Conduct. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 16-106 NMRA of the Rules of Professional Conduct.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph B makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Paragraph F of Terminology of the Rules

of Professional Conduct. knowledge can be inferred from circumstances and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under Paragraph B, the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 16-113 NMRA of the Rules of Professional Conduct to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph B also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under Rules 16-108, 16-116, 16-303 or 16-401 NMRA of the Rules of Professional Conduct. Paragraph C of this rule supplements Paragraph B of Rule 16-106 NMRA of the Rules of Professional Conduct by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Subparagraphs (1) through (6) of Paragraph B of Rule 16-106 NMRA of the Rules of Professional Conduct. Under Paragraph C the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Subparagraphs (2) and (3) of Paragraph B of Rule 16-106 NMRA of the Rules of Professional Conduct may permit the lawyer to disclose confidential information. In such circumstances Paragraph D of Rule 16-102 NMRA of the Rules of Professional Conduct may also be applicable, in which event, withdrawal from the representation under Subparagraph (1) of Paragraph A of Rule 16-116 NMRA of the Rules of Professional Conduct may be required.

[7] Paragraph D makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in Paragraph C does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraph B or C, or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes

necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. *See*Scope of the Rules of Professional Conduct. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. *See* Scope of the Rules of Professional Conduct.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph G recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 16-107 NMRA of the Rules of Professional Conduct governs who should represent the directors and the organization.

[Adopted by Supreme Court Order No. 08-8300-29, effective November 3, 2008.]

NOTES