



Chapter Handbook on Practical Labor Law

ABC's CHAPTER HANDBOOK ON PRACTICAL LABOR LAW

I.	ABOUT THIS HANDBOOK.....	1
II.	THE ROLE OF ABC CHAPTERS IN HELPING MEMBERS WITH LABOR ISSUES.....	2
1.	Resource Materials Available from ABC National.....	4
III.	WHAT TO DO WHEN UNION ORGANIZING STARTS.....	5
1.	Basic NLRB Election Procedures.....	6
2.	Why Not A Union?.....	9
3.	Do's And Don'ts For Supervisors.....	11
4.	Checklist For Responding To Union Organizing.....	14
IV.	COPING WITH COMET – SALTING IN THE CONSTRUCTION INDUSTRY..	17
1.	Legal Status of Salting.....	18
2.	Sample Merit Shop Hiring Policies.....	20
3.	Questions and Answers in a Salting Campaign.....	21
4.	"Coping With COMET Checklist".....	22
5.	Salting in Apprenticeship Programs.....	23
V.	HOW TO DEAL WITH UNION PICKETING.....	25
1.	Legal and Illegal Union Protests.....	26
2.	“Secondary” Picketing and Reserved Gates.....	27
3.	Other Forms of Union Protests.....	29
4.	Violence and Mass Picketing.....	29
5.	Picket-Line Checklist.....	31

VI.	DEALING WITH OTHER UNION PRESSURE TACTICS.....	33
1.	Union Corporate Campaigns.....	34
2.	Techno-Terrorism.....	36
3.	Job Targeting Programs.....	40
4.	Suing Unions: The Risks and Rewards.....	40
VII.	RESPONDING TO DEMANDS FOR UNION-ONLY PROJECT LABOR AGREEMENTS	41
1.	What is a Union-Only PLA?.....	42
2.	Seven Steps to Combatting Union-Only PLAs: A Guide for ABC Chapters.....	43
3.	Union Arguments and Counter-Arguments Regarding PLAs.....	45
VIII.	STARTING AND MAINTAINING A DUAL SHOP.....	47
1.	Single Employer v. Dual Shop – What It Means.....	48
2.	Checklist for Separate Dual Shop Status.....	49
IX.	DAVIS-BACON AND OTHER WAGE AND HOUR LAWS.....	51
1.	The Davis-Bacon Act.....	52
2.	Complying With the Fair Labor Standards Act.....	58
X.	EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION.....	62
1.	Equal Employment Laws Generally Applicable to Construction.....	63
2.	Prohibitions Against Sexual and Other Harassment	63
3.	Sample EEO Policies.....	66
4.	Affirmative Action Requirements for Government Contractors in the Construction Industry.....	68
XI.	OCCUPATIONAL SAFETY AND HEALTH.....	71
1.	Checklist for Dealing With an OSHA Inspection.....	72

2.	Checklist for Establishing a Safety Program.....	72
3.	Hazard Communication.....	75
4.	Checklist for Drug and Alcohol Control.....	77
XII.	WRONGFUL DISCHARGE LAW.....	79
1.	Specific Legal Theories Under Which Discharge Decisions May Be Subject to Challenge.....	80
2.	A Termination Checklist.....	81
XIII.	EMPLOYEE HANDBOOKS AND PERSONNEL POLICIES.....	83
1.	The Employee Handbook: Friend or Enemy.....	84
2.	ABC’s Model Handbook – Table of Contents.....	86
XIV.	PERFORMANCE CLAUSES IN CONSTRUCTION CONTRACTS.....	90
XV.	IMMIGRATION LAW ISSUES IN THE CONSTRUCTION INDUSTRY.....	94
1.	The Employment Eligibility Verification (“I-9”) Process.....	95
2.	Securing Non-Immigrant Visas.....	97
3.	Obtaining Permanent Resident Status for Foreign Workers.....	99
XVI.	CHAPTER APPRENTICESHIP TRAINING PROGRAMS.....	100
1.	Federal Regulations Governing Apprenticeship and Training.....	101
2.	Employee Retirement Income Security Act (ERISA).....	102
3.	Crediting Contributions to ABC Apprenticeship Programs Under the Davis-Bacon Act.....	104

PART I

ABOUT THIS HANDBOOK

This handbook has been created so that ABC Chapter staff and members can get quick answers to some of the most common labor and employment law questions confronting merit contractors in the construction industry. ABC was founded in 1950 to preserve free enterprise in the construction industry –the right of every firm (general contractors, subcontractors, suppliers and associates) to do business with anyone it chooses – union or nonunion, and to assure that any firm may work side-by-side with any other firm.

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

One of ABC’s goals is to provide labor relations information to its members, keeping them informed as to their rights under law. Chapter staff are often called upon to answer member questions about union tactics, government investigations and many other aspects of labor and employment issues. In order to keep members informed, it is important that each Chapter have available certain basic information on these important subjects. That is what this handbook is for.

The format of this handbook is by its nature general only, and is not intended to substitute for legal advice. Chapter staff should not attempt to dispense legal advice. Members should be advised to seek legal assistance from the Chapter attorney or ABC National’s counsel under the free “Hot Line” program.

This handbook has been reviewed and edited by ABC’s General Counsel, Maurice Baskin, Esq., of the Washington, D.C. law firm of Venable LLP. Questions about its contents should be directed to ABC National’s staff at 703-812-2000.

PART II

THE ROLE OF ABC CHAPTERS IN ASSISTING MEMBERS

Chapter staff may be called upon to play a variety of roles in connection with labor problems confronting chapter members. As is further explained below, chapter executives need to be prepared to provide information to members, to direct members to chapter attorneys, or to call upon the resources of ABC National. Often, the most important function which chapter staff can perform is to recognize the seriousness of labor issues facing a member, so as to give timely warning of greater trouble ahead and the need for expert legal advice. Careful reading of the remaining chapters of this handbook will allow chapter staff to be able to spot labor issues as needed and know what sort of basic employer responses are normally appropriate.

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

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

This does not mean that employer members themselves are restricted from discussing labor issues with their employees or that ABC cannot help. Employers themselves absolutely can talk to their own employees on any issue, including unions, without having to file reports. The courts have also held that employers are free to redistribute their association's materials to their employees, even on association letterhead, so long as the employer exercises final control over the distribution.

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

- Make available accurate information to members on important labor relations issues.
- Become aware of ABC National's resources on labor issues and how to access those resources.
- Maintain close ties to a chapter attorney experienced in labor relations issues and establish a "hot line" program for members to contact the attorney in emergencies.
- Maintain an active Legal Rights and Strategy committee to advise the chapter board on pending legal issues affecting merit construction.
- Make all members aware of the availability of legal assistance funds through the Construction Legal Rights Foundation and assist members as appropriate in completing timely applications for assistance.
- Maintain an active government affairs presence in order to effectively advocate ABC's positions in support of merit construction and free enterprise.
- Understand that ABC's mission is not "anti-union" and that ABC is opposed to all forms of unlawful discrimination. ABC is "pro-competition" and recommends that all of its members obey all applicable laws.
- Monitor all management training seminars and chapter publications to insure that ABC's message is properly communicated on labor relations issues.
- Be sensitive to and avoid joint member action which could be misconstrued as anti-competitive conduct, such as price setting, boycotts, and bid rigging.
- At the same time, many joint activities which promote competition and benefit the industry as a whole should be encouraged, such as participation in prevailing wage surveys and apprenticeship training programs.

LABOR RELATIONS RESOURCE MATERIALS AVAILABLE FROM ABC NATIONAL

Labor Relations Fact File

All the basic information about labor law in the construction industry. Now on-line.

Building and Protecting Your Company's Reputation

A comprehensive guide to the new union tactic of techno-terrorism.

Coping With COMET

What contractors can do about salting -- and what they should *not* do.

You Are The Target (Video)

The most effective management training tool dealing with salting.

Practical Labor Law for Merit Shop Contractors

Complete "How To" Checklists for Staff and Members. A layman's guide to all of the most common labor problems in the construction industry.

Practical Labor Law Reference Manual

A compilation of detailed manuals on specific labor law subjects, for use by Staff and ABC members.

Open Competition vs. Union-Only Construction

A pocket-sized pamphlet about union-only project labor agreements - and what's wrong with them. For distribution to public officials and other construction users.

Union-Only Project Agreements (video)

An effective video about union-only PLAs, designed for owners and media.

Strategic Guide for Combating Union-Only Agreements

Written especially for chapters. Contains talking points about PLAs, cites to recent studies and cases, rapid response suggestions, and model open contract language.

Pocket Guide to Dealing With Union Organizing

A quick summary of answers to basic labor law problems. Designed to fit in a superintendent's pocket for easy and immediate use.

A Guide for Developing an Employee Handbook

Based upon the Venable Law Firm's Model Employee Handbook. Specially adapted for ABC and for use by merit construction contractors.

Chapter Guide to Apprenticeship Programs

Checklists for compliance with Apprenticeship Regulations; ERISA; and Davis-Bacon

Guide to Compliance with Prevailing Wage Laws

Question-Answer format developed by Maurice Baskin, Esq. for explaining basic prevailing wage law concepts to ABC members.

What to do When the Fair Wage Monitor Comes Knocking

Guide to appropriate responses to fair wage monitors -- the legal rights of ABC members and sample letters and flyers.

PART III

WHAT TO DO WHEN UNION ORGANIZING STARTS

- 1. Basic NLRB Election Procedures**
- 2. Why Not A Union?**
- 3. Do's and Don't For Supervisors**
- 4. Checklist for Responding to Union Organizing**

1. BASIC NLRB ELECTION PROCEDURES

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

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

A. VOLUNTARY RECOGNITION

--How Can It Happen?

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

--What is the Effect?

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

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

An employer is not required by law to voluntarily recognize a union, even if the union offers to submit evidence that the majority of employees want it to be their representative. The employer can refuse to look at such evidence and insist that it has a “good faith doubt” about whether the majority of its employees want the union. In that case, so long as the employer does not engage in serious unfair labor practices

(such as threatening employees with loss of benefits because of the union or promising them increased benefits if the union goes away), the union's only alternative is to seek a secret ballot election conducted by the National Labor Relations Board. (This election process is discussed below).

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

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

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

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

B. FORMAL NLRB ELECTION PROCEEDINGS

As stated above, even if the union has obtained authorization cards from a majority of the employees designating the union as their bargaining representative, the employer may nevertheless refuse to voluntarily recognize the union so long as it does not engage in any serious unfair labor practices. While the union could then try to put pressure on the employer to recognize it without an election, through recognitional picketing or calling the employees out on strike, this rarely happens. In most cases, the union will seek a secret ballot election conducted by the NLRB.

--How Does the Union Get an NLRB Election?

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

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

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

--When, Where and How are These Elections Held?

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

Normally, there will be at least two months between the date the union petition is filed with the NLRB and the date of the election. There may be much more time between petition and election if substantial legal issues are raised during a formal NLRB hearing on the petition. The employer that wishes to maintain its non-union status should use this time to try to convince the employees that they do not need a union, through the means discussed later in this handbook.

--How Many Votes Does the Union Have to Get to Win the Election?

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

--What Are the Advantages of an NLRB Election?

The secret ballot election has the advantage of providing employers with time to tell employees about the other side of the “union label,” and it ensures that employee choices will be made in an atmosphere free of the type of coercion that typically occurs when the union attempts to get employees to sign union authorization cards. Employees frequently sign these authorization cards just to get rid of bothersome or bullying union organizers or fellow employees. Statistics show, moreover, that unions which have secured a showing of interest through signed union authorization cards even from as many as 50% or more of the employees very often lose secret ballot elections when the employees have a free secret choice and the employer has taken the time to show employees the “other side of the union label.”

2. WHY NOT A UNION

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

(1) DUES-FINES- ASSESSMENTS

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

(2) LOSS OF INDIVIDUALITY

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

(3) STRIKES

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

(4) INTERNAL UNION POLITICS

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

(5) UNION COURTS-RULES AND REGULATIONS

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

(6) RESTRICTIONS ON ADVANCEMENT

Just as union contract seniority provisions affect management decisions, they also adversely affect the ambitious, capable, hardworking, but less senior employee. An employee who does not want to wait for seniority will find that he must leave the company to advance.

(7) COMPULSORY UNION MEMBERSHIP

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

(8) JOB “INSECURITY” IN THE UNIONIZED CONSTRUCTION INDUSTRY

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

3. DO'S AND DON'T'S FOR SUPERVISORS

The National Labor Relations Act specifically gives employers the right of “free speech” on labor matters. Employers therefore do have the right to talk to their employees about unions and to express their views on why a union would not be in the employees’ best interest. In general, so long as you do not threaten workers either directly or by implications that you will take reprisals in the event they organize, and so long as you do not promise them any benefits for rejecting a union, you have a pretty free hand in telling your firm’s story. You can state facts and give your opinion on unions in general or in particular. You can present your arguments on why a union is not necessary in your firm.

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

THE DO'S

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

- You can and should talk with employees individually or in groups at any time in any public place or open working area where you would normally talk with employees, but not in any private management office.
- You can and should tell employees about any bad experiences you or others you know of have had with unions.
- You can and should talk about what harm you believe or can show unions have done in the nation, in your geographic region, in other divisions of your own operations and in other specific firms.
- You can and should state what you believe or can show to be the answer to any union propaganda, argument or claim.
- You can and should say you think employees should vote “no” in union election.

Some of the specific things an employer might want to communicate to employees are as follows:

1. Tell employees that if a majority of them select the union (an outside organization), the firm will have to deal with it on all their daily problems involving wages, hours and other conditions of employment. Advise them that the firm would prefer to continue dealing with them directly on such matters.
2. Tell employees that in negotiating with the union the firm does not have to agree to any of the union's economic demands which it believes are not in the best interest of the business.
3. Let the employees know that whatever benefits the employees receive if the union gets in will have to be negotiated with the firm. The benefits employees receive after the union gets in could be more than they now receive, however, they could also be the same or less.

THE DON'TS

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

An easy way to remember the things employers and supervisors cannot do or say during a union organizing attempt is to think of the word

T-I-P-S

It will cover most of the pitfalls you can get into until you receive professional guidance.

"T" Means Threaten. You cannot threaten individuals participating in union activities with reprisals such as reducing employee benefits, firing the employee, or retaliation of any kind, and, of course, you cannot take such reprisals.

"I" Means Interrogate. You cannot interrogate employees as to whether or not they signed any union card or whether they are supporting the organizing activity, how they intend to vote, or what they think about union representation.

"P" Means Promise. You cannot promise wage or benefit increases, promotions, or any other future benefit to employees for opposing the union, nor can you give such benefits for this reason.

“S” Means Spy. You cannot “spy” or surveil on union activities to determine who is attending union meetings or who is signing union cards or supporting the union. This applies to both worktime and non-work time, on and off the firm’s premises.

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

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

TEST OF “SUPERVISOR” STATUS

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

Primary Tests – Analysis of the statutory definition of supervisor reveals that Congress has set up twelve specific criteria in the nature of types of authority under the LMRA (Taft-Hartley Act). These test “authorities,” to be exercised upon other employees and in the interest of the employer, are the authority (1) to hire, (2) to transfer, (3) to suspend, (4) to lay off, (5) to recall, (6) to promote, (7) to discharge, (8) to assign, (9) to reward, (10) to discipline, (11) responsibility to direct by exercising independent judgement rather than routine or clerical in nature, and (12) to adjust grievances. By adding the words “or effectively to recommend such action,” Congress in effect doubled the twelve specific tests. To the authority to hire, for example, is added the further authority “effectively to recommend” hiring, and so on down the list of specific “authorities” listed above.

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

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

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

4. CHECKLIST FOR RESPONDING TO UNION ORGANIZING

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

A. Contacts With the Union

The best thing for the employer to do if a union organizer comes to the premises or telephones to talk with the employer about unionizing workers is the following:

1. The employer should NOT look at anything the union wants to show, especially union authorization cards signed by some to the employees.

2. The employer should NOT discuss any labor contract proposals or any personnel benefits or policies of the firm with the union representative.

3. Tell the union representative the following "magic words" and **NOTHING MORE** and ask him to leave:

"I have good faith doubt that your union represents a majority of my employees in an appropriate bargaining unit. I insist on the holding of properly conducted secret ballot election administered by the National Labor Relations Board before recognizing your union as their bargaining representative."

4. If the employer should receive a letter from a union:

Do not open it if it appears “thick” enough to contain union authorization cards. Instead, call you labor lawyer immediately.

5. If the letter is opened by mistake and cards are present, do not look at them. Call another member of management in as a witness, tell them what has happened and that you have not looked at the cards, replace the cards in the envelope and seal it, and call your labor lawyer immediately.

6. If the letter does not contain cards or other evidence that your employees have designated the union as their bargaining representative, but merely contains the union’s claim that the union represents them, you should respond in writing to the union, expressing your “good faith” doubt in its claim, after consulting with your labor lawyer on how to work the letter.

B. Contacts With Employees

1. The employer’s senior management group should be talked to in order to try to find out why the union is attempting to organize employees, and exactly what organizing activity they are aware of to date. Chances are that some of them will know facts that the chief executive does not know.
2. The employer should call a meeting of its supervisors and other who exercise front-line authority for management, usually with labor counsel present, making sure not to include in the group any “borderline” non-supervisory persons like lead men who might conceivably be legally entitled to inclusion in the bargaining unit with other employees eligible to vote. Brief this group on the situation and find out what they know about it. In addition to group meetings, supervisors should be talked to individually, to ascertain exactly what they know of the union activity.
3. The employer should clearly state to all supervisors its position with respect to the union drive. Let them know that there is no need for the employees to be represented by a labor union if the management team does its job properly, and that the employer intends to make every legitimate effort to encourage employees not to sign union cards and to vote against the union if and when an election is held.
4. Both the supervisors and the members of the senior management team should be instructed as to the legal “do’s and don’ts” discussed in this handbook. They should be told to immediately increase their personal contacts with the workers in their operations and to engage in informal conversations with them at every opportunity. Once they have been properly briefed, supervisors should make a point of talking to everyone they supervise on at least a daily basis if possible. Ask them to keep you fully informed on anything that they learn about the organizing attempts or of any changes in attitudes, indications of union coercion, employee huddles, rumors, etc.
5. The employer should set up a method for the senior management team and supervisors to report regularly and promptly what they find out in their

conversations with employees. All leads and tips should be immediately followed up in this “hot line” communication network.

6. After proper briefing by labor counsel, the employer should set up a series of meetings with employees in small groups during which a member of high-level management discusses the union organizational drive, and the reasons why the employees do not need a union.
7. These meetings should be followed with additional “rap sessions,” and with follow-up letters to the home and other communication vehicles (posters, buttons, flyers, payroll stuffers, movies, displays, etc.) as deemed necessary and appropriate.
8. The employer should meet regularly (at least once a week) with the entire management team during this period in order to determine how well your campaign is succeeding and the issues that need to be covered with employees in the remainder of the campaign.

C. Contacts With the NLRB

Once the union has filed a petition with the NLRB the NLRB will send the employer a letter which informs that a petition has been filed and further requests that the employer furnish certain information to the NLRB on government forms attached to the letter. After the employer receives this letter, it can expect to be contacted by the NLRB Agent assigned to the case. That agent will want to ask questions regarding the petition and the employers legal position with respect thereto.

Before the legal case is discussed with the NLRB is discussed with the NLRB Agent and before the employer fills out any NLRB information forms, he should get in touch with a labor lawyer. As for the hearing, the employer is entitled to a reasonable period of time to prepare for it, with the assistance of labor counsel. The employer’s decision on these issues can have a direct bearing on whether or not a union comes into the business!

D. Role of Chapter Staff

ABC Staff should be familiar enough with the disadvantages of unionization and the NLRB election procedures, both of which are described above, to be able to answer the employer’s most immediate questions. In this way, members can be prevented from making costly mistakes prior to obtaining counsel. Chapter Staff should not purport to give legal advice, however, but should refer members to experienced labor attorneys.

One final word of caution to Chapter Staff: As noted previously in this Handbook, the law requires that detailed public financial reports must be filed if anyone other than the employer or the employer’s supervisors speaks directly to employees in order to “persuade” them on the subject of unions. Therefore, Chapter staff normally should limit their activities to advising employer members as to what can be said or written by the employer himself.

PART IV

COPING WITH COMET – SALTING IN THE CONSTRUCTION INDUSTRY

- 1. Legal Status of Salting**
- 2. Sample Merit Shop Hiring Policies**
- 3. Questions and Answers in a Salting Campaign**
- 4. “Coping With COMET” Checklist**
- 5. Salting in Apprenticeship Programs**

1. Legal Status of Salting

The most prominent union tactic during the last several years has been “salting” the workforce. This tactic gained attention in 1993, when the AFL-CIO’s Building and Construction Trades Department began its Construction Organizing Membership Education Training Program (COMET). The COMET program trained thousands of union members to become union salts, whose declared mission has been to infiltrate non-union workplaces with the goal of increasing the costs of doing business in the merit shop.

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

In 1996, the Supreme Court held in the case of *Town & Country Electric v. NLRB* that paid professional union organizers fall within the statutory definition of employees/employee applicants. This means that such organizers must be treated like any other applicant, i.e., in a nondiscriminatory manner. As a result of the *Town & Country* decision, there are now hundreds of unfair labor practice charges pending against employers who have either refused to hire union organizers or who have terminated the organizers from employment.

The *Town & Country* case only requires nondiscriminatory treatment of union organizers. Employers are still entitled to rely on nondiscriminatory hiring policies and to employ only the most qualified and productive employees. There have been a number of recent decisions by the NLRB and the courts in which a variety of workplace policies have been tested, and many more cases remain pending.

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

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

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

While unions have the right to attempt to organize construction workers, merit shop contractors and their employees also have a right to refrain from supporting union activities and to be free of unwarranted harassment. ABC believes that employers should fully comply with the National Labor Relations Act, including the rules against discrimination in hiring and employment. At the same time, by improving communications with employees and understanding the legal “do’s and dont’s,” employers who wish to do so can maintain their lawful nonunion status.

2. SAMPLE MERIT SHOP HIRING POLICIES

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

1. We hire applicants solely based upon merit. We do not discriminate on the basis of union affiliation, race, sex, color, age, national origin, disability or any other protected status.

2. No employee is required to pay dues to any labor organization to join our company.

3. We accept job applications only when we know there are jobs available and when we intend to fill the position(s). When openings become available, we reserve the right to review applications already on file, prior to hiring. Applications remain open for consideration for ____ days. It is the applicant's responsibility to keep our hiring personnel informed of his/her availability.

4. We hire based on personal contact with individuals so that we can make sound business judgments as to the most qualified applicants.

5. Any applicant who falsifies or omits information on the application is disqualified from being hired. If the employee has been hired before the falsification or omission is discovered, he or she is subject to termination. (This information should be printed on your application form.)

6. We base our hiring decisions on a variety of factors, including skills and ability to perform the job, prior employment with us, employment references as to character and willingness to work, willingness to accept the offered salary, and personal interviews.¹

7. Full-time employees are expected to work only for us and must state that they will not be employed by any other employer while they work for us.

This outline does not constitute legal advice or opinion. Remember that the National Labor Relations Board has held that implementation of facially neutral hiring policies with *discriminatory intent*, or *inconsistent enforcement* of facially neutral policies, can result in

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

findings of unfair labor practices. Specific salting issues may also be the subject of changing policies at the National Labor Relations Board.

3. QUESTIONS AND ANSWERS IN A SALTING CAMPAIGN

Here are some common issues for contractors that arise during a salting effort:

1. Can I ask an applicant about his/her union affiliation?

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

2. Must I hire a prounion applicant?

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

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

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

4. Can I still hire the most qualified applicant?

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

5. Can I disqualify an applicant who puts false information on his/her application?

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

6. Can I discharge a union organizer?

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

4. COPING WITH COMET CHECKLIST

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

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

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

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

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

DO hire the most qualified applicants for open positions.

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

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

5. SALTING IN APPRENTICESHIP PROGRAMS

In recent years, as salting has become more common and ABC Chapters have become more active in apprenticeship training, some chapters have been confronted with attempts by union organizers to infiltrate non-union apprenticeship training programs. In general, the recommended response to such apprenticeship salting is similar to the response to salting in employment generally: nondiscrimination in both hiring and training and nondiscriminatory enforcement of legitimate training practices and school rules are the best courses of action.

Two potentially different types of salts may seek to enter into a Chapter training program: "student" organizers and "instructor" organizers. Though students are not directly covered by the National Labor Relations Act, it is generally recommended that chapter apprenticeship programs follow a policy of nondiscrimination in allowing entry of apprentice applicants into training. This means that applicants must meet standard criteria (and that union journeymen are typically disqualified by having too much experience for them to seek training as apprentices). Once enrolled, all apprentices can and should be required to adhere to nondiscriminatory school policies, including nonsolicitation policies prohibiting disruption of class time.

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

Chapters should be entitled to enforce nondiscriminatory no-solicitation policies during class time with regard to salting instructors. Any union organizing by a salted instructor should be limited to non-class time. In addition, all instructors can and should be required to follow the prescribed training curriculum. Finally, as a representative of ABC and its training program, an instructor should refrain from making derogatory statements about the quality of ABC's training or about member employers. In this regard, the apprentices are in effect the "customers" of the training program, and there is strong case law holding that employees owe a duty of loyalty to their employer not to disparage the quality of the employer's product to customers.

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

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

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

DO NOT establish discriminatory hiring or training policies designed to “screen out” union organizers. Legitimate, non-discriminatory hiring policies can and should be applied consistently, however.

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

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

DO hire the most qualified applicants for open instructor positions.

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

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

PART V

HOW TO DEAL WITH UNION PICKETING

- 1. Legal and Illegal Union Protests**
- 2. “Secondary” Picketing and Reserved Gates**
- 3. Other forms of Protests**
- 4. Violence and Mass Picketing**
- 5. Picket-Line Checklist**

1. LEGAL AND ILLEGAL UNION PROTESTS

It is generally legal for unions to peacefully hand out truthful fliers (handbilling) on public property.

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

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

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

2. SECONDARY PICKETING AND RESERVED GATES

Unions have the right to picket contractors with whom they have a labor dispute. However, “secondary” picketing is picketing aimed at “neutral” employers, including customers and subcontractors, and is generally prohibited by the Labor Management Relations Act. The NLRB has established a legal doctrine designed to prevent secondary picketing against neutral contractors on a common work site, known as the “reserved gate” doctrine. Under this doctrine, the NLRB requires that picket signs must note truthfully against whom any picketing is being conducted. Picketing must be done only at times that the target firm is engaged in work at the jobsite. Finally, the picketing must be done as closely as possible to the area in which the target firm is working. Under these principles, picketing at entrances reserved for neutral employers is subject to injunction.

To make appropriate use of the NLRB’s reserved gate policy, whenever picketing is anticipated, it is recommended that reserved entrances be established by the owner of the property or the person with control over the use of the property, or a neutral in the labor controversy. Reserved entrances must be clearly separated and must be the only entrances used to enter or leave the project. Block off all unmarked entrances. The entrances must be clearly marked so that anyone approaching the project or place of business will know which entrance to use. Place entrance numbers on the backs of the sign so that people leaving the area will also be able to identify the entrances.

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

GATE ONE

This entrance is reserved for the exclusive use of employees, business visitors and suppliers of

PICKETED EMPLOYER

All other persons must use Gate Two. These restrictions are strictly enforced.

2(a). The entrance which all other persons are to use to enter and leave the project or place of business should be posted with a sign which states:

GATE TWO

This entrance is reserved for the exclusive use of employees, business visitors and supplier of

**NEUTRAL EMPLOYER 1
NEUTRAL EMPLOYER 2
NEUTRAL EMPLOYER 3**

All employees, business visitors and supplier of PICKETED EMPLOYER must utilize Gate One. These restrictions are strictly enforced.

2b). **Alternatively**, the GATE TWO sign can be worded in the negative, so as to avoid identifying the neutral contractors, as follows:

GATE TWO

This entrance may **not** be used by

PICKETED PRIMARY EMPLOYER

and its employees. This entrance is reserved for the exclusive use of employees and suppliers of Neutral Employers.

The signs should be on 3' x 4' exterior plywood (or similar material) with a white background and black lettering of one inch. There is no limit to the number of entrances you may establish, provided each is properly marked. It is of critical importance that these entrances not be misused once they are established. The entrances must be observed by members of management as well as all other employees.

The final step in making the reserved entrances effective is to contact the union, describe the reserved entrance system to them and assure the union that your employees and suppliers will only use Entrance No. 1 (or whichever entrance or entrances which you are entitled to use). This contact should be in writing with a return receipt requested so it will be easier to prove should litigation be necessary. If the union fails to adhere to the reserved gate system, an unfair labor practice charge should be filed with the NLRB, together with a request for an injunction.²

² Even where a union is engaged in picketing or similar activity at an appropriate entrance, there are other legal ground rules which may come into. First, the NLRB has held under Section 8(b) (7) of the Act that unions cannot engage in "organizational" picketing for more than 30 days without filing an election petition. To evade this rule, unions frequently direct their picketing towards an employer's alleged failure to that such "informational" picketing is really intended to organize the employers' workers and on injunction can be requested from the NLRB.

3. OTHER FORMS OF UNION PROTESTS

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

The Supreme Court has held in the case of *Lechmere v. NLRB* (1992), that employers’ property rights are generally given priority over union demands of access to inform the public of its views, via picketing *or* handbilling. Proper posting and enforcement of no trespassing policies are important to preserving fundamental property rights on construction sites. Employers should obtain legal counsel wherever a question arises about union claims of access to private property.

Recent cases at the NLRB have raised the question of whether large banners stationed by unions at neutral employer entrances constitute protected free speech or unprotected secondary picketing. Other cases have addressed whether union noisemakers (amplifiers, etc.) are lawful under both the NLRA and local ordinances. Legal counsel should be consulted with regard to the legality of particular union tactics under the latest case law.

4. VIOLENCE AND MASS PICKETING

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

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

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

1. Notify responsible local police officials that picketing is or soon will be expected. Request police protection.

2. Maintain a detailed log of all events on the picket line, including eyewitness account, photographs and/or videotape.

3. Fax the international union to inform them that they will be held responsible for any violence or damage committed by local representatives.

4. Consult labor counsel as to the appropriate time for filing a court action seek injunctive relief against union violence. Do not merely rely on the construction user to deal with the courts.

5. Consult labor counsel as to whether civil damages can be sought under recent court decisions applying the Racketeering Influenced Corrupt Organizations Act (RICO) to union violence and extortion.

5. PICKET LINE CHECKLIST

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

a. Enforce No-Trespassing Policies (Know Your Property Rights)

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

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

b. Maintain Incident Reports/Logs

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

c. Notify Corporate Management Immediately of Any Union Activity.

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

d. Be Careful With Cameras

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

e. Notify the Police and Consider Increased Security

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

f. Consider Special Entrances for Construction Contractor Employees.

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

g. Do Not Threaten or Harass Pickets

Except where they engage in trespass, there is normally no reason to engage in dialogue with pickets or handbillers. Certainly there should be no "shouting matches." Trespassers should be told firmly to leave the property, and if they refuse the police should be called. It may also be advisable to obtain some form of identification from anyone who appears to be "in charge" of picketers or demonstrators. Otherwise, there is normally no need to communicate with union agents.

PART VI

DEALING WITH OTHER UNION PRESSURE TACTICS

- 1. Union Corporate Campaigns**
- 2. Techno-Terrorism**
- 3. Job Targeting Programs**
- 4. Suing Unions: The Risks and Rewards**

1. DEALING WITH UNION "CORPORATE CAMPAIGNS"

Recently, in the face of merit shop inroads on many formerly union-dominated sectors of the construction industry, union leaders have begun to fight back with new, sophisticated and, in some instances, illegal pressure tactics designed to coerce owners and construction managers into restricting free competition in construction. Unions have recently sponsored consumer boycotts, mass demonstrations, "greenmail" legal challenges, press attacks, coercive use of pension fund investments and legislative lobbying in order to achieve their objectives. The single goal: intimidation of construction owners and managers, both public and private, into refusing to deal with merit shop non-union contractors, notwithstanding the numerous cost advantages resulting from free market bidding on construction jobs. Most of the unions' efforts have been directed towards pressuring construction users into signing so-called "union-only" project agreements, the preferred means by which unions seek to exclude merit shop contractors from construction jobs.

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

Public Relations

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

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

Litigation

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

Unfair labor practice charges at the NLRB (challenging unlawful secondary boycotts and unlawful interference with employees and customers);

State court litigation (defamation, interference with contract, mass picketing injunctions);

Federal court litigation (antitrust, RICO and other damage actions).

2. TECHNO-TERRORISM

A. Introduction to Techno-Terrorism

Groups surreptitiously holding themselves out as 'public interest' researchers are using both internet research and deceptive information to twist and distort the records of merit shop contractors. These groups at times mail information to past, current and potential clients as well as members of local communities and government officials attacking merit shop firms. With only one or a few staff, an internet driven group can do research and target your firm for a campaign of distortion and deception. Such tactics are referred to as **techno-terrorism**, since these groups often use the internet to gather data on your company that is then used to assault your reputation behind the pretense of consumer advocacy.

In order to discredit merit shop firms, techno-terrorists conduct on-line research of a company's record with the Occupational Safety and Health Agency and other federal agencies. Court records involving the contractor can be obtained by computer as well in many jurisdictions. The merit shop contractor's record is then twisted, distorted and taken out of context in order to destroy the company's reputation. Potential clients, and even entire communities have been targeted with flyers and the like to frighten them away from the company.

If any violations of regulatory or legal guidelines are found in the company's history, the merit shop contractor is portrayed as a villain of draconian proportions with the goal being to have the contractor eliminated from bid lists and other work opportunities. Not surprisingly such attacks have at times been simultaneous with an all-out effort by local unions to recruit away the targeted firms workers.

One organization that has been leading the techno-terrorism charge against merit shop contractors goes by the name LASER Inc., an acronym for Legal and Safety Employer Research. LASER promotes itself as a "non-profit mutual benefit corporation," but acts like "prevailing wage monitors," REBOUND and Northwest Fair Contracting. In reality, Dun and Bradstreet and other reports indicate that LASER was started on April 15, 1991 by labor unions throughout 12 western states, and the organization is operated exclusively by a former business manager of Boilermakers Union Local 549, of Pittsburgh, California. LASER is based out of Gridley, California. LASER appears to be the successor to a group by another name, which conducted a corporate campaign against an ABC member from Colorado.

LASER's modus operandi is to glean tidbits of factual information from public records and then weave an interesting and often deceptive conjectural story around this information to create a negative perception of the merit shop firm. Once this conjectural propaganda against the company is created, LASER then may target current and potential clients of the company, employees of the company and members of the community with this distorted data.

B. Responding to Techno-Terrorist Attacks

An assault by a LASER-style organization on your reputation can be a crisis. How you prepare for and respond to that crisis can determine whether the techno-terrorist organization adversely impacts your profits, your employees and your reputation.

- a. **Develop a crisis response team** – Put together a team in your firm that will be responsible for strategy and tactics as you respond to campaigns against your firm. It is recommended that this team include your president/CEO, key leaders of your staff or board of directors and any communications professionals and legal counsel in your firm.
- b. **Designate one spokesperson** – Your firm should have a single spokesperson. You should also designate a back-up for times when this person is unavailable. It is recommended that you designate your CEO/president as spokesperson.
- c. **Consider professional spokesperson training** – Groups like ABC can assist in guiding you in finding professional public relations/media relations training. Some of the tips in this guide are also helpful in preparing to be the “voice” of your firm to its varied publics, including the news media. Often there are local public relations professionals who could provide ‘one on one’ spokesperson training as well.
- d. **Devise a plan for communicating with your employees** Your employees will likely find out about the campaign against your firm. In fact, in some cases the union sponsors of such campaigns are also beginning to run corollary campaigns to recruit away your workers. You should decide how to communicate with your employees on such matters.

ABC member firms should consider several resources for educating employees about the benefits of working merit shop:

1. ABC V2K toolbox talks
2. “Opportunities in Merit Shop Construction” (brochure)
3. “MERIT SHOP: A Team Approach to Construction”, or “How to Build Team Spirit and Increase Productivity” (video)
(To order the “Team” video contact ABC at (703) 812-2007 or abcstore@abc.org)

To access information that can help you communicate effectively with your employees visit:

www.abc.org/V2K/toolboxtalks

www.abc.org/opportunitiesbrochure

- e. **Gather positive information on your firm** – Collect and catalogue information highlighting positive aspects of your firm including positive safety statistics, information on the company safety program, any news coverage or other information on company led community service activities.
- f. **Develop a company brochure or guidebook** – You are your own strongest advocate. Many of America’s most successful construction companies have a brochure or guidebook that describes the company’s identity, successes and mission. This can be a vital tool to include as a part of a packet to clients. If done well, it can diffuse the distorted presentation that LASER or other groups provide to your clients.
- g. **Do your own investigation of your firm** – Where are your weak spots? Catalogue and list all past OSHA violations, legal cases and any other issues with regulatory agencies, personnel and the like. Prepare a defense of your firm that explains the what and why of each situation.

Explain what your firm has done to alleviate any problems. This is NOT to be shared with the techno-terrorist firm. Remember they are only out to harm your good name. In its totality it is NOT to be shared with clients. Its purpose is to provide your spokesperson critical talking points to respond to highly specific questions that may arise because of the techno-terrorist campaign against your firm.

Go to the OSHA website:

<http://www.osha.gov/cgi-bin/est/est1> and examine your company’s safety record on-line. There have been cases where other companies’ violations have been erroneously listed under a similarly named company. Additionally, cases may have been settled or resolved and still be listed on the web-site. Knowledge is power. Know what these techno-terrorist organizations can learn about your firm on-line.

- h. **Become media relations savvy**

ABC’s media relations tips: Effective media relations is an ongoing process. It is ABC National working with journalists at *Engineering News-Record*, *The Wall Street Journal*, national broadcast outlets and state and local media.

It is each ABC chapter working with journalists for major state and local media outlets. It is also each ABC member working with local and construction trade media to let the public know about the benefits of the merit shop construction workplace.

Journalists work on tight deadlines. They have to report on major stories in short segments on radio or television and in limited column space in the newspaper.

If a techno-terrorist campaign against your company becomes high profile, you've got to let the media know you're there, and that you've got something to say. Someone must be assigned to handle this area just as one would be assigned to handle matters of safety, manpower and training, education, labor and so forth.

A series of "no comments" to the media in response to questions about techno-terrorist charges against your company will often build suspicion and negative publicity against your firm.

C. Techno-Terrorism and The Law

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

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

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

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

3. JOB TARGETING PROGRAMS

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

The U.S. Department of Labor (DOL) has held that it is unlawful for unionized contractors to accept “rebates” of wages paid on public projects in the form of job targeting subsidies. This ruling has been upheld by two federal courts in ***Building Trades v. Reich*** (D.C. Cir. 1994) and ***IBEW v. Brock*** (9th Cir. 1994). In another case, ***NLRB v. IBEW*** (9th Cir. 2003), the NLRB held that it is an unfair labor practice for unions to collect job targeting dues assessments from members in violation of the Davis-Bacon Act. Litigation is pending at the NLRB that could extend this ruling to state prevailing wage laws, further impacting on the collection of funds for job targeting programs. Contractors and chapters who learn of improper collection of job targeting funds by unions should consider filing appropriate charges with either the NLRB or the US Department of Labor. Further guidance on this issue is available from ABC National.

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

4. Suing Unions: The Risks and Rewards

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

The Supreme Court addressed this issue in ***BE&K Construction v. NLRB*** (2002). The Court declared invalid the former NLRB standard that had chilled employers' rights to challenge union activities in courts. Since the ***BE&K*** decision, the standard for what will be a “legal” lawsuit against unions remains unclear, except that no longer will employers be punished under the National Labor Relations Act merely because a lawsuit they have filed in good faith against a union is not successful.

PART VII

RESPONDING TO DEMANDS FOR UNION-ONLY PROJECT AGREEMENTS

- 1. What is a Union-Only PLA?**
- 2. Seven Steps to Combatting Union-Only PLAs: A Guide for ABC Chapters**
- 3. Union Arguments and Counter-Arguments Regarding PLAs**

1. WHAT IS A UNION-ONLY PLA?

A project labor agreement is “union-only” if it requires contractors and/or subcontractors to sign collective bargaining contracts with labor unions as a condition of performing work on a particular project. Such contracts typically require the employer to subject its employees to exclusive union representation for all work performed on the project, to pay union wage rates and benefits, to adhere to restrictive union work rules and classifications, to utilize a union hiring hall, and to subcontract only with other union contractors.

The Supreme Court and the National Labor Relations Board have held that a union-only PLA is permitted on private projects under Section 8(e) of the National Labor Relations Act, so long as the signatory to the project agreement is a construction industry employer who is engaged in collective bargaining with the union. **See Woelke & Romero** (1982) The Board and courts have further held that a project agreement can be lawful under Section 8(e) of the Act even if the construction user does not yet have any employees working on the construction job, because Section 8(f) of the Act permits construction industry employers to sign so-called “pre-hire” agreements.

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

At the same time, owners and construction managers, public or private, are never **required** to enter into such project agreements. The choice is up to them whether or not to restrict free competition. Under this principle, President Bush issued a federal Executive Order banning union-only PLAs from federally funded construction projects. This Order was upheld by the courts in the case of **BCTD v. Allbaugh** (2002).

2. SEVEN STEPS TO COMBATTING UNION-ONLY PLAS: A GUIDE FOR ABC CHAPTERS

As union-only PLAs have appeared throughout the country, ABC chapters have found that no single strategy or device exists which guarantees that open competition can be preserved. At the same time, those chapters who have followed all of the strategies discussed below have had the greatest success in blocking union-only requirements, particularly on public projects.

1. **Prepare In Advance.** The chapter should establish a committee or task force of staff and members who will be available on short notice to meet with public officials, testify at hearings, etc., and who will be familiar with the issues surrounding union-only agreements. Advance preparation should also include meetings and contacts with local procurement officials and politicians, before any talk of union-only PLAs occurs.

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

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

4. **Mobilize Grass Roots Membership Support.** Public officials and/or private developers must hear from someone other than paid staff. Union-only PLAs cannot be stopped without genuine outrage vocally expressed by taxpaying contractors and, if possible, their employees. Members must send as many letters, faxes, e-mails, and phone calls as possible. Personal attendance at meetings and public appearances, and even picketing, have also proven effective.

5. **Build Coalitions and Involve the Public At Large.** It is important to reach out beyond ABC's membership, and beyond the construction industry, to show government officials that union-only PLAs are unpopular with taxpayers in general. Coalitions with

other trade groups like AGC, minority contractor groups, non-construction groups (local Chambers) and local taxpayer groups are all strongly recommended. Advance contacts are again helpful.

6. **Use Paid Media To Reach The Public.** Surveys have shown that the public at large typically opposes union-only requirements, once they hear about it. Without use of paid media, however, the issue often does not reach the public. Full page ads, radio, TV, and billboards have all been used successfully in a number of campaigns against union-only PLAs. Use of paid PR consultants should also be considered to help determine the most effective local message. Keep in mind that many ads for all media have already been developed by other chapters and collected for your use by ABC National. Financial assistance can be obtained by contacting the CFE.

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

Post-PLA: Monitor Bad Projects And Prepare For The Next Fight. Even if all of the above efforts are unsuccessful and a particular project is performed on a union-only basis, the chapter's efforts should not end. Several chapters have turned failure into success by closely monitoring union-only projects and publicizing their cost overruns, safety problems, delays and other defects. Politicians who feel the pressure from the first PLA are sometimes more reluctant to do the unions' bidding the next time around. It is also important to send any material on "bad" union-only projects to ABC National, for use in the next battle.

3. UNION ARGUMENTS AND COUNTERARGUMENTS RE PLAS

“Tradition” of union-only in some geographic areas and on big projects justifies continued reliance on unions

“Tradition” has been overstated; in any event, present industry is 80% non-union; many large projects have been built non-union or mixed (merit); also even union contractors and groups (AGC) have opposed union-only PLAs; it’s not just a union v. non-union issue

Private sector does it

Private owners are not bound by competitive bidding laws; they are spending their own money, not the taxpayers’; and most private owners think union-only is a bad idea

Saves money (vs. unionized projects without PLAs)

No evidence that union-only saves over open competition (comparisons are always against union projects without PLAs); we have studies showing increased costs; discouraging non-union contractors from bidding is inherently likely to reduce number of bids and increase prices of those bids which are received

No increased costs to public where projects are covered by prevailing wage laws

Non-union contractors are able to reduce bid prices due to greater efficiencies, even on prevailing wage jobs

Courts have upheld them

Some have, some haven’t; at the highest state court level, the majority view is to limit union-only requirements

Lack of impact on competition - “anyone can bid” and “many” non-union companies have bid on PLA projects

Being able to bid is hollow, if the work cannot be performed on a more efficient non-union basis, without using one’s own employees and work practices; previous claims that “many” non-union contractors have bid on PLAs have turned out to be untrue; in any event, it is clear that the number of non-union bidders is reduced where PLAs are in place.

Union workers are “safer”

Evidence is to the contrary, according to OSHA fatality statistics

Avoids labor strife and jurisdictional disputes – avoids delay

The threat of labor strife is extortionate; and there has been very little labor strife which is caused real delay in most parts of the country; there are many legal devices available to control labor-based delay - reserved gates, injunctions, police powers, performance clauses; finally, litigation is more likely to cause delay

Insures higher quality workers - guarantees labor supply

Union workers are not necessarily higher quality; local union contractors often face labor shortages, forcing reliance on out of state contractors; discouraging 80% of the industry from bidding will reduce the supply of workers for the project

Non-bidders are making mere “philosophical” choice and are not really harmed

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

PLAs are not discriminatory; and do not violate right to work laws

The issue is not whether they legally require union “membership,” but whether employees should have to give up their right to refrain from union representation in order to work on public projects; most minority and women contractors have come out against union-only requirements

PART VIII

STARTING AND MAINTAINING A DUAL SHOP

- 1. Single Employer v. Dual Shop – What It Means.**
- 2. Checklist for Separate Dual Shop Status**

1. SINGLE EMPLOYER V. DUAL SHOP – WHAT IT MEANS

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

However, unions are obviously less enthusiastic than employers about these arrangements, and have attacked dual shop operations from several legal angles. The National Labor Relations Act (the “Act”), the Employee Retirement Income Security Act (“ERISA”) and antitrust laws have all been used to limit the conditions under which such dual shops may operate. Legislation has also been introduced which would eliminate double breasting in the construction industry. The employer who seeks to operate dual shops must therefore follow stringent legal guidelines imposed by the NLRB and the courts to successfully establish and operate in both the union and merit shop sectors of the market.

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

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

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

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

- Common ownership of financial control.

No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show 'operations integration,' particularly centralized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.

The Board has repeatedly applied these four criteria in dual shop situations in determining whether a second, newly-created nonunion company is subject to the collective bargaining agreement between the parent company and the union and must recognize that union as bargaining representative for its employees. Within this context, the union often claims that the new nonunion company is not really a separate employer, the new company must recognize the union and apply the terms and conditions of the collective bargaining agreement between the union and the parent company.

2. A DUAL SHOP CHECKLIST

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

1. Act on lawful motivation.
2. Review the geographical jurisdiction of current collective bargaining agreements (if any)
3. Consider purchase of an active, ongoing business.
4. Determine whether applicable union contracts contain restrictive "anti-dual shop" clauses.
5. Ascertain whether at the time the union was originally recognized or at any time thereafter it ever represented a majority of the contractor's employees in the bargaining unit.
6. Vest overall policy as well as day-to-day control of labor relations in the second firm's management.
7. Delegate absolute control over day-to-day operations to a general manager or superintendent who has no connection with the original business.
8. Avoid interchange of rank-and-file employees.

9. Engage in a different type of construction.
10. Avoid interlocking officer and boards; use strict accounting for salaries of officials who serve both companies.
11. Avoid interchange of supervision.
12. Use separate office facilities.
13. Use separate office clerical personnel.
14. Share tools and equipment, if any, on an arms-length, businesslike basis.
15. Use separate payrolls.
16. Do not refer customers from one business to the other.
17. Submit separate job bids.
18. Use competitive bidding to award subcontracting work.
19. Establish an independent line of credit for the new company; avoid interchange guarantees of performance bonds.
20. Use separate bank accounts.
21. Avoid insuring the two companies under a single policy.
22. Use different time clocks.
23. Advertise separately.
24. Differentiate vacation policy.
25. Use different telephone lines.

PART IX

DAVIS-BACON AND OTHER WAGE AND HOUR LAWS

- 1. Compliance With the Federal Davis-Bacon Act and Related Laws**
- 2. Complying with the Fair Labor Standards Act**

1. COMPLIANCE WITH THE FEDERAL DAVIS-BACON ACT AND RELATED LAWS

A. COVERAGE OF THE ACT

Q: What does the Davis-Bacon Act require?

A: The Davis-Bacon Act requires covered contractors and subcontractors to pay laborers and mechanics employed on government funded contracts at wage rates determined by the Secretary of Labor to be "prevailing" for employees engaged on similar projects in the locality. The statute can be found at 40 U.S.C. §3141, et seq. The U.S. Department of Labor has published regulations governing enforcement of the law at 29 C.F.R. Part 5. The Department's interpretation of the Act is also contained in its Field Operations Handbook, excerpts of which are reprinted later in this manual.

Q: Which contractors does the Act apply to?

A: The Act applies to contractors and subcontractors performing contracts in excess of \$2,000 for the construction, alteration, and/or repair of public buildings or public works, including painting and decorating, where the United States or the District of Columbia is a direct party to the contract. The Act's requirements have also been written into many federal laws which come into play in the construction of hospitals, housing complexes, sewage treatment plants, highways, and airports. (The "Davis-Bacon Related" Acts). Contracts for lease agreements with the government may also be covered, where the costs of construction under the lease are a significant aspect of the lease. **See *Building and Constr. Trades Dept., AFL-CIO v. Turnage*** (D.C. Cir.1988). The contract bid specifications are supposed to put contractors on notice that they are subject to the Act, though this does not always occur.

Q: Which employees are covered?

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

Q: Where does the Act apply vis-a-vis the “site of the work?”

A: A court of appeals has held that neither delivery drivers nor batch plant operators are covered by the Act where they perform all but an incidental portion of their work off the site of actual construction. **See *Building and Const. Trades Dept., AFL-CIO v. U.S. Dept. of Labor (Midway Excavators)***(D.C. Cir.1991); ***Ball, Ball & Brossamer v. Reich***, (D.C. Cir. 1994). The Labor Department has not fully accepted this ruling, however, and is still seeking to apply the Act to some off-site work. See 29 C.F.R. §5.2(i), and final rule issued December 19, 2000.

B. DETERMINING THE PREVAILING WAGE RATES

Q: How is the prevailing wage rate determined?

A: The Secretary of Labor is responsible for determining the prevailing wage rate for each class of laborer or mechanic in a given locality. The Secretary determines the proper rate on the basis of periodic wage surveys as well as information supplied by contractors, trade associations, and unions. If the Secretary determines that fifty percent of employees in a given classification in the area are paid at a certain rate, then that rate will be deemed to be "prevailing". If no single rate is paid to fifty percent of the employees, then the Secretary calculates the prevailing wage based upon a "weighted average" of the wage rates found to be paid in the area. The General Accounting Office has recently reported that the Labor Department's wage survey process is "seriously flawed," but the courts continue to defer broadly to the Department's wage determinations.

Q: Where is the prevailing wage published?

A: The Department of Labor's Wage and Hour Division publishes general wage determinations for every locality in the country. Separate wage determinations are issued for four categories of construction: residential, building, heavy industrial and highway. Special wage determinations for particular projects may also be attached to the bid specifications for the project.

Q: How are job classifications defined in wage determinations?

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

Q: What about fringe benefits?

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

Q: What if the published wage rate seems wrong?

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

C. PAYING THE PROPER RATES

Q: How do contractors comply with the prevailing wage requirements?

A: A contractor may fulfill prevailing wage obligations under the Act by: (1) paying for both designated wages and fringe benefits in a single cash payment; (2) paying the prevailing wage rate in cash and contributing amounts specified in the wage determination towards "bona fide" fringe benefits; or (3) paying some combination of both wages and fringe benefits which adds up to the total of wages and benefits set forth in the wage determination. For example, if a wage determination lists a basic hourly wage of \$10 per hour, a health and welfare rate of \$.50 per hour, and a pension rate of \$.50 per hour, then a contractor is entitled to pay \$11 in cash wages, or \$10 in cash plus \$1 in any "bona fide" fringe benefit, or \$9 in cash and \$2 in fringe benefits. See 29 C.F.R. §5.31. Labor

Department rules may impose maximum limits on the amount which can be credited towards fringe benefits, as opposed to wages.

Q: How much credit do contractors receive for fringe benefit contributions?

A: The Labor Department prohibits employers from using fringe benefit contributions which benefit employees on non-government work to discharge the contractor's obligations on Davis-Bacon jobs. This frequently means that contractors receive only an "annualized" (reduced) percentage of credit for fringe benefit contributions, such as health insurance and apprentice training costs. See DOL Field Operations Handbook 15f13. In the past, an exception has been made and full credit has been allowed for pension/profit sharing contributions, to the extent that they irrevocably vest on behalf of employees working on government work.. This exception was reaffirmed in the case of **Tom Mistick & Sons, Inc. v. Reich** (D.C. Cir. 1995).

Q: How do contractors receive credit for apprenticeship training costs?

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

Q: Are separate wage rates recognized for helpers?

A: Under revised rules issued by the Department of Labor in 1982 and 1989, semi-skilled helper classifications were supposed to be recognized as prevailing, and were to be paid a wage rate lower than journeymen, if the number of journeymen and helpers working on projects in the area exceeded the number of journeymen working without helpers in the area. However, the Department of Labor has reversed course and has declared that helpers will be recognized only in the **rare** situation where their job duties are "**separate and distinct**" from those of journeymen and the separate helper classification can be proven to "prevail." For all practical purposes, helpers are no longer recognized on federal projects covered by Davis-Bacon.

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

A: Contractors are entitled to pay the prevailing wage rate for the actual hours spent by an employee in each of several classifications, but only if the work performed is truly capable of separation into more than one classification, and only if time records are kept in accordance with actual hours spent in each classification. Contractors should never assume that their standard practices and cross-training of employees will be accepted by government regulators.

D. PAYROLL REPORTING REQUIREMENTS

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

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

Q: What about union job targeting (subsidy) programs?

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

Q: What are the penalties for not complying with the Act?

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

E. COMPLIANCE WITH STATE PREVAILING WAGE LAWS

At last count, 34 states have prevailing wage laws similar to, though often varying from, the Davis-Bacon Act. Some states cover more work and more types of employees. Many states have created different exceptions to coverage, while some states have recognized that there is no real need for prevailing wage laws at all.

F. The Chapter's Role in Area Wage Surveys

ABC National's publication, "The A-B-C's of a Davis-Bacon Wage Survey," provides detailed information on conducting an area wage survey. As explained there in greater detail, Chapters should do the following:

1. Solicit support from the Chapter Executive Committee and Board, and establish a Prevailing Wage Committee.
2. Establish a good working relationship between the chapter and the local and regional DOL offices.
3. Gather information on existing projects to be surveyed.
4. Send a letter to members explaining the purpose of the wage survey. Enclose survey forms.
5. Make follow-up telephone calls to get survey forms returned.
6. Maintain confidentiality of wage survey data, preferably using an outside CPA.
7. Deliver the data to the Labor Department's regional wage specialist.
8. Follow-up with Labor Department to insure continued action.
9. Challenge erroneous wage determinations, if necessary, at the Administrative Review Board or in court.

2. COMPLYING WITH THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act contains provisions and standards concerning minimum wages, equal pay, maximum hours and overtime pay, recordkeeping, and child labor. These basic requirements apply to employees engaged in interstate commerce and also to employees in certain enterprises which are engaged. The law provides certain specific exemptions from these requirements as to employees employed by certain establishments and in certain occupations. The Act is administered by the U.S. Department of Labor's Wage and Hour Division.

This handbook provides general information concerning the application of the Fair Labor Standards Act to employees of construction firms. If you have specific questions about the statutory requirements, contact the chapter attorney or the Wage and Hour Division's nearest office. Offices are listed in the telephone directory under Department of Labor in the U.S. Government listing.

A. Coverage of the Act

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

The Act does not regulate payments to "independent contractors" but employers should be careful not to improperly assume a worker is an independent contractor when the Department of Labor considers him to be a covered employee. The government will consider a variety of factors in making this determination, focusing generally on the right to control the means and methods of performing the work.

B. Minimum Wage and Overtime Pay

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

The regular rate includes all remuneration for employment, such as attendance bonuses, production bonuses, shift differentials, and other extra payment for work actually performed. Payments which are not part of the regular rate include reimbursement for expenses incurred on the employer's behalf; premium payments for overtime work; the premium portion of time-and-one-half paid for work on Saturdays,

Sundays, and holidays; discretionary bonuses; gifts and payments in the nature of gifts on special occasions; payments pursuant to certain profit-sharing, welfare, or thrift and saving plans; and payments for occasional periods when no work is performed due to vacation, holiday, or illness.

C. Hours of Work

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

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

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

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

Travel time spent carrying heavy, burdensome equipment is hours worked. On the other hand, carrying light hand tools between an employee’s home and the work site, involving no appreciable burden or inconvenience, is not hours worked. In determinations of this, some consideration must be given to the custom in the industry. For example, it is part of a carpenter’s principal activities to carry the usual tool box, containing hammer, saw etc., from home to work site, and time so spent would not be considered hours worked.

A complete discussion of these and other “hours worked” situations may be found in the Division’s Interpretative Bulletin, Part 785.

D. Executive, Administrative, and Professional Exemptions

The Act provides a minimum wage and overtime pay exemption (but not from its equal pay provisions) for any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman, as these terms are defined in the Wage and Hour Division's Regulations, Part 541. **The Department of Labor has recently issued a new rule revising these definitions, effective August 23, 2004.** The rule is subject to challenge in Congress and the courts by organized labor and other interest groups. As many as 18 states also maintain stricter overtime requirements than the federal government.

E. Child Labor Provisions

The Fair Labor Standards Act provides a 16-year minimum age in occupations other than those non-agricultural occupations declared hazardous by the Secretary of Labor. An 18-year minimum age applies in such hazardous occupations.

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

Whenever State and Federal child labor standards apply to same employment, the higher standard prevails. To protect themselves from unwitting violations, employers may obtain employment of age certificates which furnish them with reliable proof of age for minors employed by them. Any person who violates the child labor provisions or any regulation thereunder is subject to a civil penalty not to exceed \$1,000 for each violation. The Act also provides for enforcement by civil or criminal proceedings in the courts.

F. Records

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

Special information is required on employees under uncommon pay arrangements or to whom board, lodging, or other facilities are furnished. Records of the required information must be preserved for three years. Some supplementary items like timecards need be kept only two years. Microfilm copies of records are generally acceptable.

Some of the specific recordkeeping items required by Regulations, Part 516 are the following:

1. Name of the employee in full.

2. Home address, including zip code.
3. Date of birth, if under 19.
4. Sex and occupation.
5. Time of day and day of week on which the employees' workweek begins.
6. Regular hourly rate of pay in any workweek in which overtime premium is due; basis of wage payment (such as "\$6 hr., " "\$125 day," "\$400 wk. Plus 5% commission").
7. Daily and weekly hours of work.
8. Total daily and weekly straight-time earnings.
9. Total overtime excess compensation for the workweek, where applicable.
10. Total additions to or deductions from wages paid each pay period.
11. Total wages paid each pay period.
12. Date of payment and the pay period covered by payment.

A covered establishment must display a poster where the employees may readily see it. This poster, which briefly outlines the Act's basic requirements, may be obtained free from the nearest office of the Wage and Hour Division.

G. Enforcement

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

It is violation of the law to discharge an employee for filing a complaint or participating in a proceeding under the law. Willful violations may be prosecuted criminally and the violator fined up to \$10,000. A second conviction for such a violation may result in imprisonment. A two year statute of limitations applies to the recovery of back wages except in the case of willful violations, for which there is three-year statute of limitations.

PART X

EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION

- 1. Equal Employment Laws Applicable Generally to Construction Contractors**
- 2. Prohibitions Against Sexual and Other Harassment**
- 3. Sample EEO Policies for the Construction Workplace**
- 4. Affirmative Action Requirements for Government Contractors in the Construction Industry**

1. **EQUAL EMPLOYMENT LAWS APPLICABLE GENERALLY TO CONSTRUCTION CONTRACTORS**

All firms which employ 15 or more employees for each working day during 20 weeks per year are covered by Title VII of the 1964 Civil Rights Act. The Act prohibits discrimination in employment based on race, color, religion, sex or national origin. In addition, the Age Discrimination in Employment Act prohibits discrimination based upon age. The Americans With Disabilities Act prohibits discrimination against qualified individuals with a disability. Contractors should also be aware of state and local fair employment laws and regulations, many of which prohibit discrimination even by the smallest employers.

These laws only prohibit discrimination and do not require affirmative action. However, those employers who perform government contracts may be required to implement an affirmative action program (discussed below).

2. **PROHIBITIONS AGAINST SEXUAL AND OTHER HARASSMENT**

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of sex. Courts and the Equal Employment Opportunity Commission (“EEOC”) consider the ban against sex discrimination to include sexual harassment. The principles applicable to sexual harassment have further been extended to apply to harassment based upon most other protected categories of employment (race, religion, age, disability, etc.).

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

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

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

1. **Quid Pro Quo:** Sexual favors in exchange for job benefits or avoidance of job detriment.

2. Hostile or Offensive Work Environment: Verbal or physical conduct of a sexual nature which creates a hostile or offensive work environment.

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

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

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

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

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

How To Conduct A Credible Harassment Investigation

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

maintain confidentiality to the fullest extent possible; and (3) stress the importance of documentation of all aspects of the complaint and investigation process.

- ❑ Step One: Interview The Complainant.
- ❑ Step Two: Memorialize Complainant's Fact Statement.
- ❑ Step Three: Interview The Alleged Offender.
- ❑ Step Four: Give The Accused The Opportunity To Submit A Written Statement Summarizing His Position With Respect To The Individualized Allegations Made By Complainant, And Identifying All Persons Who Would Corroborate His Version Of Events.
- ❑ Step Five: Review The Statements Of Both The Complainant And The Accused To Identify Points Of Agreement And Disagreement. Separately List Facts In Dispute For Continuing Investigation.
- ❑ Step Six: Reinterview The Complainant To Discuss The Accused's Version Of Events And To Highlight The Facts In Dispute.
- ❑ Step Seven: Interview Witnesses Offered By The Complainant And The Accused.
- ❑ Step Eight: Meet With Line Management, Human Resources Management And Legal Counsel To Review The Results Of The Investigation, To Determine If Further Investigation Is Required, And If Not, How To Conclude The Investigation.
- ❑ Step Nine: If The Investigation Reveals That Harassment Occurred In Violation Of Company Policy, Determine What Disciplinary Action Should Be Imposed.
- ❑ Step Ten: Communicate The Results Of The Investigation To The Parties And To Management Personnel Involved In The Parties' Chain Of Command.
- ❑ Step Eleven: Clean Up The File.

3. SAMPLE EEO POLICIES

OUR EQUAL EMPLOYMENT POLICY

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

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

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

If you feel you are being unlawfully harassed, report this to your supervisor immediately, or if you prefer, report the problem to your Department Head or the Personnel Director. No one will be subject to, and the Firm prohibits, any form of discipline or retaliation for reporting incidents of unlawful harassment or pursuing any such claim.

OUR POLICY AGAINST HARASSMENT

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

-- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or submission to or rejection of such conduct is used as the basis for an employment decision affecting the individual exposed or subjected to such conduct, or

-- where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

The Firm will not condone or tolerate the harassment of its employees by their co-workers, supervisors or any individual under our control. All employees, regardless of position or title, will be subject to severe discipline, up to and including discharge, should the Firm determine that an employee is engaged in the sexual harassment of another individual. The Firm will promptly and thoroughly investigate the facts and circumstances of any claim of sexual harassment.

If you feel that you are being subjected to sexual harassment or any other form of unlawful harassment, you should report this to your supervisor immediately, or, if you would prefer for whatever reason to discuss the matter with someone else, report the problem to the supervisor's superior or to the Personnel Director. No individual will be subject to, and it is the Firm's policy to strictly prohibit, any form of discipline or retaliation for reporting incidents of sexual or other harassment or pursuing any claim of sexual or other harassment.

AFFIRMATIVE ACTION (Where Required by Law)

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

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

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

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

To assure compliance with the Firm's Affirmative Action Plan, _____, Affirmative Action Officer, has been designated to administer and monitor the plan and

make reports to Senior Management. The Plan is available for inspection in accordance with applicable regulations.

4. AFFIRMATIVE ACTION REQUIREMENTS FOR GOVERNMENT CONTRACTORS IN THE CONSTRUCTION INDUSTRY

The following materials re designed to help construction employers establish an affirmative action program for their companies. Unlike government contractors in most other industries, construction contractors are not required to perform the same types of statistical utilization analysis in conjunction with establishing affirmative action plans. The OFCCP of the U.S. Department of Labor has established specific regulations for construction contractors to follow, including:

- a. Contractors should have copies of memoranda to supervisory staff, or minutes or notes of staff meetings or EEO officer's meetings with supervisors to inform them of the contractor's obligation to maintain a working environment free of harassment, intimidation, and coercion and to where possible, assign two or more women to each construction project. Monitoring of work environment by EEO officer.
- b. Contractors should have a current listing of recruitment sources for minority and women craft workers. It must have copies of recent letters to community resource groups or agencies specifying the contractor's employment opportunities and the procedures one should follow when seeking employment. It must note the responses received and the results on the bottom or reserve side of the letters or establish a follow-up file for each organization notified.
- c. Contractors should have a file of the names, addresses, telephone numbers, and crafts of each minority and woman application showing the date of contract and whether or not the person was hired and (if not) the reason; whether or not the person was sent to a union for referral and what happened; and (c) follow-up contacts when the contractor was hiring.
- d. Contractors should have records of contributions in cash, equipment supplied or contractor personnel provided as instructors for Bureau of Apprenticeship and Training-approved or Department of Labor-funded training programs and records of the hiring and training of minorities and women from such programs. Supply copies of letters informing minority and women's recruitment sources of schools of these programs.
- e. Contractors should have written EEO policies that include the name and contact information on the contractor's EEO officer and must (a) include the policy in any company policy manuals; (b) post a

copy of the policy in any company bulletin boards (in the office and on all job sites); (c) put in records, such as reports or diaries, that each minority and woman employee is aware of the policy and that it has been discussed regularly at staff meetings; (e) make copies of newsletters and annual reports that include the policy; and (f) make copies of letter to unions and training programs requesting their cooperation in helping the contractor meet its EEO obligations.

- f. Contractors should have written records (memoranda, diaries, minutes of meetings identifying the time and place of meeting, persons attending, subject matter discussed, and disposition of subject matter.
- g. Contractors should have copies of (a) letters sent, at least every 6 months or at the start of each new major contract, to all recruiting sources (including labor unions and training programs) requiring compliance with the policy; (b) advertising that has the EEO (tagline" on the bottom; and (c) letters to all subcontractors and suppliers, at least at the time the subcontract is signed, requiring compliance with the policy.
- h. Contractors should have written records of contracts (written communications, telephone calls, or personal meetings) with minority and women's community organizations and recruitment sources, and schools and training organizations, specifying the date(s), individuals contacted, results of the contact, and follow-up. I must have copies of letters sent to these organizations at least 1 month prior to acceptance of applications for training (apprenticeship or other) describing the opening, screening procedures, and tests to be used in the selection process.
- i. Contractors should have copies of diaries, telephone logs, or memos indicating contacts (written and oral) with minority and women employees requesting their assistance in recruiting other minorities and women, and record results. If contractors normally provide after-school, summer, and vacation employment, it must have copies of letters to organizations under item h describing those opportunities and must have responses received and results noted on letters or in a follow-up file.
- j. Contractors should have evidence in the form of correspondence, or certificates that all tests and interview and selection procedures used by the contractor, a craft union, or Joint Apprenticeship Committee meet the requirements in the OFCCP testing and selection guidelines.
- k. Contractors should have written records (memo, letters, personnel files, etc.) showing that the company makes annual reviews of minority and female personnel for promotional opportunities and notifies these employees

of training opportunities (formal or on-the-job) and encourages their participation.

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

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

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

o. Contractors should have copies of memos, letters, reports, minutes of meetings, or interviews with supervisors regarding their employment practices as they relate to the contractor's EEO policy and affirmative action obligations, and written evidence that supervisors were notified when their employment practices adversely or positively impacted on the contractor's EEO and affirmative action posture.

PART XI

OCCUPATIONAL SAFETY AND HEALTH

- 1. Checklist for dealing with an OSHA Inspection**
- 2. Checklist for Establishing a Safety Program**
- 3. Checklist for Hazard Communication**
- 4. Checklist for Drug and Alcohol Control**

1. **CHECKLIST FOR DEALING WITH AN OSHA INSPECTION**

- a. Determine which agency has jurisdiction.
- b. Designate a management team responsible for handling for such investigations.
- c. Conduct a self-audit of each worksite for possible safety violations in advance of and OSHA inspector.
- d. Ensure that all mandatory recordkeeping is current.
- e. Establish groundrules at the opening conference when the inspector arrives.
- f. Consider whether to permit the inspection or demand an inspection warrant.
- g. Exercise the right to accompany the inspector during the inspection.
- h. Control the scope of the inspection where possible.
- i. Get copies of all photographs.
- j. Duplicate all industrial hygiene sampling.
- k. Duplicate all measurements.
- l. Be careful of employee interviews.
- m. Avoid making admissions against interest.
- n. Do not be afraid to get competent legal help.
- o. Establish a system to handle document requests.
- p. Obtain all possible information at the closing conference.

2. **CHECKLIST FOR ESTABLISHING A SAFETY PROGRAM**

a. POLICY STATEMENT ON SAFETY

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

b. SAFETY PROGRAM OBJECTIVES

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

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

c. DEFINITION OF RESPONSIBILITIES FOR SAFETY

One person should be responsible for coordinating safety, regardless of other duties. It is very possible that in a small firm, one person may be management, supervision and safety coordinator. This does not detract from the level of safety performance that can be achieved. The person must recognize the responsibility involved based on the job function at the time of involvement.

d. SAFETY RULES

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

e. NEW EMPLOYEE ORIENTATION

A few minutes should be spent with each new employee to provide an orientation in the firm's operation and its policies on certain subject, including safety. A record of the orientation must be placed in the employee's personnel file. The record should contain the date of the orientation, list of subjects covered, list of materials given the employee, the name of the person doing the orientation.

f. SAFETY EDUCATION AND TRAINING

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

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

g. JOB INSPECTIONS

h. ACCIDENT INVESTIGATION

At the very least, all incidents involving a visit to a physician, clinic or hospital, and those resulting in \$50 or more in property damage should be investigated, and a report submitted. However, even if no report is submitted, all incidents, including near-misses, should be questioned using the same investigative techniques, in order that corrective action may be taken to prevent a similar incident from occurring.

i. FIRST AID

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

j. PERSONAL PROTECTIVE EQUIPMENT

Personal protective equipment is essential for the protection of eyes, ears, face, hands, and other body parts, when working around hazardous machinery or materials. At locations, where employees are required to use personal proper use and maintenance; told when it is to be used; told its benefits; told its limitations; told when and how it is to be replaced; checked to see if they are medically capable of wearing the equipment; and checked for proper fit.

k. RECORDKEEPING AND DOCUMENTATION

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

Employer's First Report on Injury or Illness

This form, completed by the employer to report an employee injury or illness, will be furnished by the claims office of the insurance carrier or by the state workers' compensation division in those states that are administered by a state fund. In all cases of accidental death or severe injury requiring more than jobsite first aid, this form must be completed.

Foreman's Report on Injury

This form is to be completed by the employee's foreman for each work-related injury requiring medical treatment and turned in to the appropriate supervisor for comments no later than one day following notification of the injury.

Log and Annual Summary of Occupation Injuries and Illnesses (OSHA No. 200)

All recordable occupational injuries and illnesses, other than first aid cases, as required by the regulation issued under the Occupational Safety and Health Act of 1970, shall be recorded on this form.

ABC has published a “Model Safety Program” for the Construction Industry – A Basic Approach.” This publication can be obtained by calling ABC’s national office (202) 637-8800.

3. HAZARD COMMUNICATION

The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) has issued a standard which affects every single contractor and builder in the construction industry. The rule is called the Hazard Communication Standard (or “HazCom” for short), it requires all contractors to educate their employees about the hazardous chemicals they are exposed to in the workplace and the methods necessary to protect themselves.

What Are Employers Required to Do?

1. Material Safety Data sheets
2. Labels
3. Employee Training
4. A Written Hazard Communication Program

Material Safety Data Sheets (MSDSs)

Since September 23, 1987, employers should have been receiving MSDSs with every shipment of hazardous substances. It is the responsibility of supplier/distributors to provide MSDSs with the products they are selling.

The MSDSs will vary in length from two to twenty pages, depending on the make-up of the substance. These documents should give a complete breakdown on the hazards associated with the products being used and will be a key to effective employee training. Your MSDSs must also be readily available to any employees who want to see them.

Labels

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

Employee Training

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

Generally, office personnel will not be required to be trained, since office products, are not classified as hazardous substances. However, if some employees are principally responsible for the copying machine and handle the chemicals associated with it, then they should be trained about the dangers.

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

1. How to spot hazards.
2. What the physical and health hazards are of that chemical (See the chapter "Common Hazards on construction Sites.")
3. What they need to do to protect themselves.
4. About the company's written hazard communication program.

Written Hazard Communication Program

Under HazCom, employers also are required to have a written hazard communication program. This is also very important because during an OSHA inspection, it is likely to be the first thing the inspector asks to see. Essentially, the written program will be a description of everything done to comply with HazCom. It must also be made available to employees and employee representatives should they ask to see it. The written program has to be maintained at all of your jobsites, and you may see fit to tailor it to specific jobsites.

What Are The Responsibilities to Other Employers on Site?

One of the most difficult parts of compliance for contractors will be the multi-employer worksite requirements of HazCom. These provisions require them to inform employees about the hazards they may be exposed to by other employers working on the same site.

Employers must obtain from other contractors working in the same area of the site, at the same time:

1. Information about the hazardous substances that employees may be exposed to:
2. An explanation of the labeling system the other contractor is using;
3. Information about the precautionary measures employees need to take to themselves during normal operating conditions and in emergencies.
4. Location of MSDSs for substances brought to the site by other employers.

ABC has published a guide to compliance with the Hazard Communication Standard. The book is entitled "Hazard Communication: An Interim

Guide for the Construction Industry,” and can be obtained through ABC’s National office, (202) 637-8800.

4. AN EMPLOYER’S CHECKLIST FOR DRUG AND ALCOHOL CONTROL IN THE WORKPLACE

- a. Obtain top management’s commitment to firm but fair program to protect the safety, health and productivity of employees as well as the security of products, facilities and other property of the firm from the dangers of drug and alcohol abuse in the workplace.
- b. Draft a comprehensive Drug and Alcohol Control Policy which is designed to maintain a safe working environment for employees and protect the firm’s property, including the firm’s intention to identify, treat, and if necessary, discipline drug and alcohol abusers. (If any of the employees are represented by a labor union, there may be a legal duty on the firm to notify the union prior to implementation of the provisions of this policy and give the union an opportunity to discuss the terms).
- c. Review with labor counsel the legal pitfalls in enforcement of the policy including employee defenses based on constitutional claims or unreasonable search and seizure, the right to privacy and the due process of laws: civil rights statutory claims of disparate impact of testing on minorities or discrimination against a “handicapped” individual; common law tort actions of unreasonable intrusion or abusive discharge; breach of an implied employment contract; or failure to discharge for “just cause” under a labor contract. These defenses may vary significantly depending on whether the employer is public or private, union or non-union, and whether employees or applicants are being screened.
- d. Conduct an educational work shop for all supervisory personnel before the policy is formally placed in effect. Some of the topics to be discussed include the effects of drug abuse on daily operations and on the firm’s safety program, how to recognize and document the physical and psychological aspects of drug abuse, a description of drugs commonly abused, an introduction to drug paraphernalia and unauthorized items potential places of drug concealment, and application of the firm’s policy and search procedures.

- e. Draft the employment application to include a statement informing job applicants that they may be tested for drugs and alcohol, that they must sign their consent to the firm's access to any medical records pertaining thereto, and that the results of such testing may be one of the factors considered in determining whether an offer of employment will be made or whether future employment will continue.

- f. Revise the Employee Handbook and/or Personnel Policy Manual to spell out the specific work rules for administering and enforcing this Drug and Alcohol Control Policy.

- g. Contact local drug/alcohol rehabilitation centers and consider establishment of an Employee Assistance Program either in-house or through a competent outside private agency.

- h. Communicate the new policy to all employees and make clear that it will not become effective (including testing) for a reasonable, specific period of time. Such fair notice reduces potential moral problems and claims of unfair treatment, helps satisfy any due process claims, and allows hard core abusers to resign from the work force or "go straight."

- i. Determine whether testing for the presence of drugs which may have been used off premises is desirable or necessary, and which types of testing are desirable for which categories of employees.

- j. Review all sample collection and testing procedures to insure fairness and conformance to governmental or contractual obligations.

PART XII

EMPLOYEE DISCHARGE LAW

- 1. Specific Legal Theories Under Which Employers May Find Their Discharge Decisions Subject to Challenge.**
- 2. Checklist for Avoidance of Unlawful Discharge Litigation.**

1. **Specific Legal Theories Under Which Employers May Find Their Discharge Decisions Subject to Challenge**

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

In recent years, however, employees have persuaded the courts to re-examine this traditional common law rule. As a result, employees are collecting damages or having their discharges overturned in a growing number of employee suits grounded on expanded notions of common law contract rights and common law torts.

The new causes of action can adversely affect employers in a number of ways, by subjecting employer defendants to increased monetary damages, longer statutes of limitations and greater likelihood of jury trials.

a. **Implied Promise of Job Security**

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

b. **Interpretation of Employee Handbooks and Personnel Policies or Practices as a “Contract”**

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

c. **Violation of Public Policy**

These cases are similar in some respects to the cases discussed under the Section on the implied covenant of good faith and fair dealing, and both theories are frequently argued alternatively. Liability results when the court finds that the employer’s discretion to discharge an employee “at will” should be limited by an important public policy, such as where an employee was discharged for refusing to commit an illegal act.

A potential danger in this area is that depending on the circumstances, plaintiffs may argue that the public policy alleged to have been violated is founded on a statute question may not provide an independent remedy. For example, nearly all employment states (e.g., Title VII, ADEA, NLRA, FLSA, OSHA, Workmen's compensation) contain specific prohibitions against employer action in retaliation against the filing of a charge of claim under the statute. Other statutes have been held to state public policies against discharge bases on polygraphs, arrest records, garnishments, shareholder rights, pensions and other issues.

d. Infliction of Emotional Distress

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

e. Defamation

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

f. Invasion of Privacy

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

2. Checklist For Avoidance of Unlawful Discharge Litigation

Chapter Staff should not attempt to give legal advice if they are consulted by members who wish to fire employees or whose decisions have already been challenged. However, Staff should know enough about the law of their state to know when to recommend that a member seek counsel from the chapter attorney. Also, the employer can be told to check his legal exposure by reviewing all discharges as follows:

a. Review all discharges to ascertain whether any allegation that the employee is being retaliated against for exercising a legal right (such as accepting jury duty, filing complaints of discrimination, reporting violations by the company, etc.) could be raised because of the timing of the discharge.

b. Review all discharges to ascertain whether, because of the timing of the discharge, an allegation could be made that the discharge was motivated by bad faith or malice, such as a desire to terminate an employee before the vesting of pension rights, or because the employee failed to succumb to the sexual advances of a supervisor or another co-worker.

c. Carefully document all disciplinary action up to and including discharge.

d. Review past similar incidents to maintain consistent discipline and avoid charges of discrimination.

e. Do not overstate or understate the basis for disciplinary action. The former could lead to charge of defamation. The latter could result in waiving the right to rely on part of the grounds for termination or could lead to charges of pretext.

f. Maintain confidentiality to the extent possible. Disclose facts relating to employee discipline only on a "need to know" basis within the workplace. Consider having only "neutral" references to prospective employers.

g. Determine whether any accommodation of protected rights (i.e., religion, handicap, etc.) is reasonable or necessary.

h. Review closely with labor counsel any employee handbook to ascertain whether it includes loosely-drafted provisions that could cause problems.

PART XIII

EMPLOYEE HANDBOOKS

- 1. The Employee Handbook: Friend or Enemy**
- 2. ABC's Model Handbook – Table of Contents**

1. **THE EMPLOYEE HANDBOOK: FRIEND OR ENEMY?**

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

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

As a result, workers are beginning to view their jobs as a vested property right, and it is no wonder that many employers have suffered “handbook horrors.” Some firms have reacted by eliminating their handbooks altogether. The question thus arises as to whether it is advisable to maintain an employee handbook and if so, how an employer can best draft the handbook to maximize its employee relations benefits while at the same time minimizing the legal risks.

The answer is that, as a practical matter, the greater risk is posed by abandoning your handbook and relying on unwritten work rules, since the courts have held that oral representations to employees and established practices also can be contractually binding. These cases are difficult to defend because of the credibility gap in proving what management’s policy or practice really was. The factual determination may be sent to a jury where (psychologically) it is the “big, bad, rich employer” versus the “poor, helpless, downtrodden worker.”

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

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

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

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

First, employers must recognize that each provision of the handbook may be interpreted as contractually binding on management. It therefore is essential to remove all provisions from the handbook that you do not intend to follow consistently.

Second, because the potential contractual liability of the handbook may be negated by legally protective language, employers should include such disclaimers where consistent with their employee relations objectives. For example, the handbook should include a statement that it is not intended to be an express or implied contract of employment. The handbook may also state that employees can be discharged at will at any time, without prior notice or warning, in management's discretion.

Third, because an employer's obligations under a contract cannot exceed what was promised, every handbook drafter should consider including broad reservations of managerial prerogatives. At the least, the handbook should reserve management's right to amend or delete any of its provisions.

A final word of caution: depending on how strongly the handbook's legal caveats are worded, they may tend to undermine the human relations value that the handbooks varies from state to state and legal counsel

should always be obtained prior to publishing or changing an employee handbook.

Chapter staff should all be aware that ABC has published at the national level a “Model Employee Handbook” for use by its members in drafting their own policy manuals. The Table of Contents of ABC’s model is set forth in the next section of this book for ease of reference. For further information, call ABC National at (703) 812-2000.

3. ABC'S "MODEL" EMPLOYEE HANDBOOK

TABLE OF CONTENTS

1.0 INTRODUCTION 1

 1.1 About This Handbook.....1

 1.2 Welcome to Our Firm.....2

 1.3 Our Firm's History.....3

 1.4 Our Equal Employment Policy.....4

 1.5 Our Policy Against Sexual Harassment.....5

 1.6 Affirmative Action.....8

 1.7 A Few Words About Unions.....9

2.0 HOW WE KEEP IN TOUCH WITH YOU.....10

 2.1 New Employee Orientation.....10

 2.2 You and Your Supervisor.....10

 2.3 Your Employee Counselor.....10

 2.4 Your Problem-Solving Procedure.....11

 2.5 Your Bulletin Board.....12

 2.6 Your Suggestion Box.....12

 2.7 Our Firm Newsletter.....12

 2.8 Your Benefits Counseling Sessions.....13

 2.9 Our Sounding Boards.....13

 2.10 Your Suggestion Awards.....14

 2.11 Our Open Door Policy.....14

3.0 ABOUT YOUR JOB.....15

 3.1 Employee Categories.....15

 3.2 Your Probationary Period.....16

 3.3 Job Classifications.....16

 3.4 Working Hours.....17

 3.5 Daily Attendance Records.....18

 3.6 Overtime Work.....18

 3.7 Evening Shift Differential.....19

 3.8 Meal and Rest Periods.....19

 3.9 Payroll Information.....20

 3.10 Government Jobs.....21

 3.11 On Call Pay.....21

 3.12 Call-In Pay.....22

 3.13 Employment of Relatives.....22

 3.14 Medical Examinations.....23

 3.15 Security Checks.....23

3.16	Lockers.....	24
3.17	Employment Referrals.....	24
3.18	Lost and Found.....	25
3.19	Accident Reports.....	25
3.20	Fire Procedure.....	25
3.21	Employee Identification Badges.....	26
3.22	Package Passes.....	26
3.23	Meal Allowance.....	26
3.24	Transportation Expense.....	26
3.25	Parking Charges.....	27
3.26	Tools.....	27
3.27	Equipment Breakdowns.....	27
3.28	Bad Weather Plan.....	27
3.29	Food Service.....	28
3.30	Employee Lounge.....	28
3.31	Tips.....	28
3.32	Personal Property.....	28
3.33	I-9 Forms.....	28
3.34	Trade Secrets and Inventions.....	29
3.35	Access to Personnel Records	29
3.36	Telecommuting	30
4.0	YOUR EMPLOYEE BENEFITS.....	31
4.1	Hospitalization and Major Medical Insurance.....	31
4.2	Life Insurance.....	31
4.3	Short-Term and Long-Term Disability Insurance	31
4.4	Continuation and Conversion of Health Insurance Benefits.....	32
4.5	Infectious Diseases.....	32
4.6	Retirement Program.....	34
4.6(a)	Profit Sharing Plan.....	34
4.6(b)	Pension Plan.....	35
4.7	Stock Purchase Plan.....	35
4.8	Bonus.....	36
4.9	Workers' Compensation.....	36
4.10	Unemployment Compensation.....	36
4.11	Social Security.....	37
4.12	Day Care Plan.....	37
4.13	Employee Loans.....	37
4.14	Credit Union.....	38
4.15	Payroll Savings Plan.....	38
4.16	Uniforms.....	39
4.17	Parking.....	39
4.18	Employee Recreational Activities.....	39
4.19	Employee Discounts.....	40
4.20	Health Services Dispensary.....	40

4.21	Severance Pay Plan.....	40
5.0	TIME OFF FROM WORK.....	41
5.1	Vacation.....	41
5.2	Paid Holidays.....	44
5.3	Funeral Leave.....	45
5.4	Jury Duty.....	45
5.5	Unpaid Leave of Absence.....	47
5.6	Family and Medical Leave.....	48
5.7	Paid Personal Leave Days.....	50
5.8	Paid Sick Leave Plan.....	51
5.9	Military Leave.....	51
6.0	YOUR CAREER DEVELOPMENT.....	52
6.1	Educational Assistance.....	53
6.2	Our Job Training Plan.....	54
6.3	Performance Reviews.....	55
6.4	Job Bidding and Promotions.....	55
6.5	Outstanding Employee of the Month and Year....	56
6.6	Service Awards.....	56
6.7	Employee Assistance Program.....	57
6.8	Work Reductions	57
6.9	Voluntary Termination.....	58
6.10	Employment Testing.....	58
7.0	WHAT WE EXPECT FROM YOU.....	59
7.1	Give Us Quality Work.....	60
7.2	Be Health and Safety Conscious.....	61
7.3	Be Alert To Security.....	62
7.4	Observe Our Rules on Workplace Smoking.....	62
7.5	Keep Us Up-To-Date.....	62
7.6	Remember Courtesy.....	63
7.7	Be Aware Of Your Personal Appearance.....	63
7.8	Respect Confidential Information.....	63
7.9	Keep Personal Visitors Away.....	63
7.10	Respect Our Policies On E-mail, Computers and other Communications Equipment.....	64
7.11	Follow Our Policy for Wireless Phone Use.....	65
7.12	Restrict Personal Phone Calls.....	66
7.13	Follow Our Guidelines for Entering And Leaving	67
7.14	Restrict Conflicting Outside Activities.....	67
7.15	Avoid Conflicts of Interest.....	67
7.16	Avoid Prohibited Solicitation of Customers	68

7.17	Obey Our Solicitation and Distribution Rules.....	68
7.18	Follow Common Sense Standards of Conduct To Avoid Major Offenses.....	69
7.19	Comply With Our Standards of Attendance.....	71
7.20	Maintain a Drug and Alcohol Free Workplace.....	72
7.21	Remember The Discharge Appeal Conference.....	75
7.22	Follow Our Alternative Dispute Resolution.....	76
7.23	Our Policy on Workplace Violence.....	77
8.0	OUR RESPONSIBILITIES.....	78
	EMPLOYER'S RECEIPT FOR COPY OF HANDBOOK.....	79
	Sample A - For New Hires Only.....	79
	Sample B - For Current Employees Only.....	80

PART XIV

PERFORMANCE CLAUSES IN CONSTRUCTION CONTRACTS

1. PERFORMANCE CLAUSES IN CONSTRUCTION CONTRACTS

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

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

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

Construction contracts usually contain a completion date, as well as specified dates for completion for designated stages of the project.

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

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

The contractor and subs are likely to be excused for any delay caused by a natural catastrophe. If the soil conditions were different from those reasonably anticipated by the contractor, he might receive some relief. Such relief would be given only in extreme cases of hardship, if at all.

Usually contracts contain what are sometimes called “force majeure,” or acts of God, clauses. These consist of a catalog of events such as floods, tornadoes, earthquakes strikes, fires, lockouts, etc. If these events occur and have a specified (make performance “impossible,” “impracticable,” or substantially hamper or interfere) effect upon the performance of the contractor, then he will be excused to the extent that these acts have delayed his performance.

The result in any particular case will depend upon the language of the clause, the gravity of the event, its unforeseeability, the impact on the contractor’s performance and whether the event was an assumed risk. Courts often go into the question of whether the particular risk could have been prevented by the exercise of reasonable care. The impact of the event upon the performance will be significant. For example, inclement weather may hamper the contractor’s performance, and make it more expensive. However, the impact upon his efficiency may or may not be extreme. In such a case, he is not likely to be given relief, despite some delay caused by the reduced efficiency.

Sometimes the parties agree on the effect of excused delay. For example, if the owner orders a change, it is advisable for the parties to try to agree both upon how the change will affect the contract price, upon the extension of time justified by the change order. If they cannot agree, the determination is usually made by the design professional. Contract clauses frequently provide that the contractor must notify the design professional in writing, within a specified period of time after the occurrence of the event causing a delay, if the contractor intends to claim an extension time. This notice is usually considered a condition precedent to awarding the extension. Even if the events were such as to merit an extension, failure to give notice often means that no extension of time will be given.

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

- A. Performance Clauses for General Contractors
 - 1. For Contractor’s Contract with Subcontractors

A general contractor's performance clause in his agreement with a subcontractor consists basically of a statement of the affirmative obligations of the subcontractor with respect to various aspects of the work to be performed. In addition, it may or may not include language detailing more specifically what constitutes a breach of the subcontractor's affirmative obligations. Further, it may or may not list specific remedies available to the general contractor in the event of a breach of an affirmative obligation imposed on subcontractor.

Clauses which state "your workers will work in harmony with other workers on the job" have resulted in a great amount of litigation.

Since the NLRB and the courts have interpreted that a union has a "legitimate interest" in insuring that union employees not be required to work "shoulder to shoulder" on a jobsite with non-union employees can be ordered off the job (pursuant to the harmony clause), all of this can be done without breach of contract remedy.

To correct this situation, ABC National has suggested deletion of the "harmony clause" and insertion of the "open shop clause." Then, the nonunion employees cannot be thrown off the jobsite without breach of contract.

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

2. Short Form

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

"[Further, Contractor may at its option, without prejudice to any other remedies it may have, terminate the employment of Subcontractor for the work under this sub-contract, and shall have the right to enter upon the premises and take possession for the purpose of completing the work hereunder of all Subcontractor's materials, tools and equipment thereon and to finish the work either with its own employees or other Subcontractors; and in case of such termination of the employment by Contractor, Subcontractor shall not be entitled to receive any further payments under the sub-contract or otherwise but shall nevertheless remain liable for any damages which Contractor incurs. If the expenses incurred by Contractor in completing the work shall exceed the unpaid balance due Subcontractor, Subcontractor shall pay the

difference to Contractor together with any other damages incurred by Contractor as the result of Subcontractor's default. Contractor shall have a lien upon all materials, tools and appliances taken possession of, to secure the payment thereof.]”

NOTE: The unbracketed portion of the above clause constitutes a basic performance clause. The bracketed portion may be used in whole or in part by the Contractor, depending on the facts and Circumstances surrounding the particular project.

Before using the “Performance Clauses,” they should be reviewed with legal counsel In relation to your entire agreement with subcontractor to make certain that there are no inconsistencies or conflicts with the other provisions thereof.

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

B. Performance Clauses for Subcontractors (Particular Suggestions for Contracts or Agreements with Union Shop General Contractors)

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

“Our firm operates Merit and Open Shop. We have figured this job at our usual rates for mechanics and will perform it with our own personnel.”

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

C. Suggested “Performance Clause” for Contractor's Purchase Order With Supplier

“Should there be any delay in the delivery of the equipment, material, or supplies described in this Purchase Order due to any work stoppage, slowdown, strike, picketing, boycott, or any other voluntary cessation of work, and which said delivery delay, in the judgement of the Contractor is causing or is likely to cause any unreasonable delay in the progress of the work to be performed at the construction jobsite, the Contractor shall have the right to terminate this Purchase Order after giving the Supplier twenty-four (24) hours' written notice of the intention of the Contractor to claim such a default.

“[The Contractor in such event shall be authorized and empowered to cause the immediate delivery of such equipment, material or supplies by whatever method and by alternate means of performance the Contractor may deem expedient, and the reasonable cost of same shall be charged to the Supplier as money paid on the Supplier’s behalf on the account of the total purchase price.) (In the event the Contractor fails to obtain such delivery within five (5) days after it has declared the Supplier in default, then the Supplier shall also be liable to the Contractor for any damages which the Contractor may sustain because of the delay in delivery, provided such delay is attribute to the Supplier’s default.]”

NOTE: The unbracketed portion of this clause constitutes a basic performance clause. The bracketed portions (or some of them) may or may not be used by contractors depending on the facts and circumstances surrounding the particular project.

Before using this “Performance Clause,” it should be reviewed with legal counsel in relation to your entire agreement with the supplier to make certain that there are no inconsistencies or conflicts with the other provisions of the purchase order.

**PART XV
IMMIGRATION LAW AND THE CONSTRUCTION INDUSTRY**

- 1. The Employment Eligibility Verification (“I-9”) Process**
- 2. Securing Non-Immigrant Visas**
- 3. Obtaining Permanent Resident Status for Foreign Workers**

I. The Employment Eligibility Verification (“I-9”) Process

A. Introduction

The Immigration Reform and Control Act (“IRCA”) was enacted in November 1986 and the Immigration and Naturalization Service (“INS”) thereafter began requiring employers to complete an Employment Eligibility Verification Form (“I-9 Form”) for each newly-hired employee to ensure that each is legally authorized to work in the United States. IRCA has two basic goals which must be kept in mind at all times when hiring new employees. First, IRCA prohibits the hiring of individuals who do not have a legal right to work in the United States. Second, IRCA prohibits discrimination against individuals who have a legal right to work in this country, based upon either national origin or citizenship status.

Stiff penalties will be levied against any contractor found to have failed to comply with either the employment verification provisions or the anti-discrimination prohibitions of IRCA. Fines for violations of the I-9 rules range from \$250 to \$5,000 per violation. In addition, employers may be subject to even higher fines, up to \$10,000 per violation, and criminal penalties, for engaging in a pattern or practice of hiring illegal workers or discrimination in hiring.

B. General Rules

Contractors should be mindful of some very basic compliance rules contained in the IRCA statute. The first is that any and every employee hired after November 1986 must complete an I-9 form. This does not mean that an employer must complete an I-9 form for every individual who applies for a job, only those individuals who actually are hired. Once the employee begins work, he or she has three business days from the date he or she begins work to provide the necessary documents to establish his or her legal right to work in the U.S., and any employee who cannot establish his or her legal right to work within three business days must be terminated.

Second, an employer cannot refuse to hire an applicant who is not a U.S. Citizen (unless the specific job requires such citizenship for legitimate reasons) or a holder of green card, if that applicant can establish his or her legal right to work in this country. Likewise, employers may not refuse to hire individuals with time-limited work authorization. Employees with time-limited work authorization are entitled to work, albeit for a finite period of time. When faced with an applicant or employee who has time-limited work authorization, an employer will be required to reverify the continued work eligibility of these individuals on or before the date their employment eligibility expires. In order to ensure proper reverification, the employer must establish and maintain a reverification calendar to keep current on the reverification obligations.

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

C. Practical Pointers

There are a few basic tips to assist employers in complying with the I-9 requirements and avoiding potential compliance pitfalls.

1. Institute Company-Wide I-9 Completion Policies

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

2. Limit the Number of Employees With I-9 Completion Responsibilities

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

3. Complete the I-9 on The New Employee's First Day of Work

In general, the best time to complete I-9s is the new employee's first day of work. If it is not possible to complete the I-9 on the new employee's first day of work. If it is discovered that a current employee was hired after November 1986 but does not have an I-9, the employer should proceed with caution, checking to make sure that an I-9 form does not already exist for this person. If not, then promptly create an I-9 form for this person as soon as possible. Upon completing the I-9, put the current date on the form. Never back date the form.

4. Maintain a Reverification System to Monitor Eligibility

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

5. Seek Legal Counsel in the Event of an Inspection

If an INS or DOL inspector shows up at your facility, do not consent to the inspector proceeding with his/her inspection at that time, and contact legal counsel immediately. By law, unless an INS or DOL inspector has a subpoena or warrant, he or she must give the employer three days notice before conducting an I-9 compliance audit.

2. Securing Nonimmigrant Visas

A. Requirements of the H-1B Category

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

In order to obtain permission to employ an individual in H-1B status, an employer must first submit a Labor Condition Application (“LCA”) to the United States Department of Labor (“DOL”), attesting to certain requirements related to wages and working conditions. Upon certification of the application, the employer must file a petition with the Immigration and Naturalization Service (“INS”) on behalf of the individual establishing that the position it seeks to fill qualifies as a specialty occupation and that the person it wishes to employ in that position possesses the necessary professional qualifications for employment in that occupation.

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

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

B. H-2B Visas for Temporary or Seasonal Nonagricultural Workers

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

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

To obtain approval of an H-2B petition, a process similar to labor certification, described below in Section IV, but somewhat faster, must be completed. The employer must file an ETA-750 application with the appropriate state employment service office, and carry out basic recruiting, posting, and advertising to fill the position(s) at issue. Once certification from DOL has been received (or notification that no certification can be made), a petition (which may include multiple foreign workers) is filed with INS on Form 1-129.

The maximum period for which an alien can be admitted to stay in the United States in the H-2B category is three years. After having spent three years in the United States, an alien may not seek extension, change of status, or be readmitted to the United States under the H or L nonimmigrant classification unless such alien "has resided and been physically present outside the United States for the immediate prior six months."

Two one-year extensions of stay may be granted to H-2B temporary workers; however, each new Form 1-129 extension petition must be accompanied by a new labor certification or notice that certification cannot be made. An H-2B alien who is dismissed from employment for any reason by the employer before the end of the approved nonimmigrant stay must be provided return transportation costs abroad by the petitioner.

3. Obtaining Permanent Residence (“a Green Card”) for Foreign Workers -- Employment-Based Preference Categories and the Labor Certification Process

Employers often wish to offer permanent positions to key foreign employees. Permanent residence status provides foreign citizens with the right to live and work in the United States without time limitations. The two primary ways to become a permanent resident are through (1) a family relationship with a U.S. citizen or permanent resident; and (2) an offer of permanent employment. It's important to keep in mind that obtaining permanent residence for a foreign worker based upon an offer of permanent employment can be a complicated and protracted process, often requiring a significant commitment and investment of time and resources. In most cases, the process requires an Application for Alien Employment Certification (“Labor Certification”), including formal recruitment supervised by the government to determine whether there are qualified American workers available for the job, followed by the filing of a preference petition with the Immigration and Naturalization Service to initiate the final stage of adjustment to permanent resident. In general, only candidates qualifying as “Multinational Executives or Managers” or those filling pre-certified shortage occupations will be exempt from labor certification.

The labor certification process normally includes the filing of a labor certification application with, and subsequent recruitment efforts supervised by, the state employment service to determine the availability of qualified American workers. This preliminary phase concludes with review by the regional office of the United States Department of Labor and issuance of a formal “labor certification.” Only then may the employer proceed with the filing of a preference petition with the Immigration and Naturalization Service (“INS”) on behalf of the specific employee, after which the employee must file an application for permanent residence with INS or for an immigrant visa at a United States Consulate abroad.

In most cases an employer begins the permanent residence-process on behalf of an employee by filing an Application for Alien Employment Certification with the state employment office, of SESA, in the state where the job is being offered. This will initiate the required test of the local labor market to determine whether a U.S. worker is willing, able, qualified, and available to perform the same work that it has offered the foreign national employee, and whether his or her employment in that position will adversely affect the wages and working conditions of similarly employed American workers. After the labor market has been properly tested, and it is determined that no qualified U.S. workers are available, the state employment office will forward the labor certification application to USDOL for final approval.

The foregoing is a very broad discussion of general principles and requirements, and must not be construed as definitive legal advice applicable in any specific matter. Facts and circumstances will vary from case to case, and adequate counsel can be provided only upon deliberate consideration of the needs and circumstances of an individual client. Further information can be obtained by consulting ABC's “Guide to Immigration Law in the Construction Industry.”

PART XVI: CHAPTER APPRENTICESHIP TRAINING PROGRAMS

- 1. Federal Regulations Governing Apprenticeship and Training**
- 2. Employee Retirement Income Security Act (ERISA)**
- 3. Crediting Contributions to ABC Apprenticeship Programs Under the Davis-Bacon Act**

INTRODUCTION

Apprenticeship training is vital to the success of merit shop construction. An increasing number of ABC Chapters have established employee training programs on behalf of member (and non-member) companies.

Federal laws governing chapter training programs are complicated, and there are many compliance steps which must be constantly monitored. The checklists which follow provide guidance on the main requirements arising under the U.S. Department of Labor's ATELS Regulations, ERISA and the Davis-Bacon Act.

Also, state laws may differ and should be consulted in connection with any chapter apprenticeship program. Keep in mind, however, that state apprenticeship councils which have been given "deferral" authority by the U.S. DOL are required to conform to federal standards or else risk deregistration by the federal agency.

1. Federal Regulations Governing Apprenticeship and Training

The federal Office of Apprenticeship Training, Employment and Labor Services (ATELS), formerly the Bureau of Apprenticeship and Training (BAT), part of the U.S. Department of Labor, has established the basic criteria for approval of apprenticeship and other training programs. ATELS approval is required in order to be certified as a bona fide apprenticeship or training program, unless there is a State Apprenticeship Council (SAC) fulfilling that role. ATELS will also step in where it finds a SAC has unreasonably withheld certification.

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

1. There must be a written plan for the program subscribed to by the sponsor.
2. The plan must provide for employment and training of each apprentice in a skilled trade.
3. The plan must include at least 2000 hours of work experience.
4. The plan must outline the supervised work experience for its apprentices.
5. The plan must provide for supplemental technical instruction of at least 144 hours per year.
6. The plan must specify progressively increasing apprentice wage rates and a specific ratio of apprentices to journeymen.

7. The plan must provide for periodic review of the apprentice's progress and document the review.
8. There must be a reasonable probationary period, terminable by either side at any time.
9. There must be adequate and safe equipment and safety training.
10. There must be minimum qualifications for entry including an age minimum of 16.
11. There must be a written apprentice agreement incorporating the program's standards.
12. Any advanced credit must be granted on equal terms.
13. Training credit must be transferable within the program.
14. There must be qualified training personnel and adequate on-the-job supervision.
15. There must be a certificate for completing the program.
16. The registering agency must be identified.
17. The plan must provide for registering and deregistering the program itself, the apprentice agreements, and any amendments.
18. The plan must contain certain specific EEO requirements and must state that it will comply with applicable EEO laws.
19. The plan must identify the person receiving and processing complaints.
20. The plan must provide for proper recordkeeping of all required records concerning apprenticeship.

2. Employee Retirement Income Security Act (ERISA)

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

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

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

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

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

Coverage under ERISA imposes certain duties on apprenticeship plan sponsors, including the following:

1. Every ERISA covered plan must be in writing.
2. The plan must be run by "fiduciaries", who owe a duty of care to the beneficiaries.
3. All assets of the plan must be held in a trust, established by a written trust document and managed by trustees. (Trustees may be designated by the chapter board and may include board members to insure continued cooperation with the chapter).
4. Employer contributions may be received in a variety of ways and need not be limited to ABC members. However, no plan assets may return to the contributing employers. (The assets must be held for the exclusive purpose of providing benefits to employee participants and defraying reasonable expenses of the plan).

5. Among other prohibited transactions, plan assets may not be transferred sold or loaned to plan fiduciaries or any party in interest to the plan. (Reasonable administrative fees are permitted).

6. Bonding of plan fiduciaries may be required.

7. Apprenticeship and training plans covered by ERISA must file reports with the U.S. Government. Unlike most other types of ERISA plans, however, a special exemption permits apprenticeship plans to file a "short form" notice with the Labor Department. The notice needs to list only the following;

(a) the name of the plan; (b) the name of the plan administrator; (c) the name and location of an office or person from whom an interested individual can obtain a description of the course of study; and (d) a description of the enrollment procedure.

8. If the "short form" is filed, no detailed financial reports (Form 5500) or summary plan description need be filed with the government or distributed employees.

As can be seen, there are a number of extra administrative requirements which result from ERISA's coverage. Failure to comply can result in significant penalties. ABC has available a number of "model" trust documents for use by chapter apprenticeship plan sponsors and strongly recommends consultation with legal counsel to insure total compliance with applicable law.

3. Crediting Contributions to ABC Apprenticeship Programs Under the Davis-Bacon Act

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

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

1. Contributions must be made to a "bona fide" apprenticeship or training program, i.e., a program registered with ATELS or a SAC.

2. Only the actual costs incurred for the training program may be credited to the contractor.
3. Costs of the program may be credited towards the contractor's other prevailing wage obligations, but only to the extent of the contractor's actual costs for training that contractor's employees.
4. Costs incurred for training of one classification of worker may not be used to offset costs required for training another classification. (A contractor cannot claim credit for costs of an electrical apprentice program to satisfy a prevailing wage requirement for carpenters).
5. Contractors may take credit for cents per hour contributions to an apprentice program or may make a lump sum payment. In the latter case, the lump sum payment is converted into an hourly cash equivalent by dividing the lump sum by the total number of hours worked by journeymen and apprentices in the trade being trained.
6. If contributions for training are made only during Davis-Bacon work, and the contractor's employees work on private jobs during the period for which training benefits them, then the contractor must proportionately reduce ("annualize") the credit taken under the Davis-Bacon Act. This is done by dividing the amount contributed by the portion of the employee's total hours worked that year. (For example: Where a contractor has contributed \$2,000 on Davis-Bacon work only, and an employee has worked 1500 Davis-Bacon hours and 500 non-Davis-Bacon hours, the contractor should take only \$1500 of credit towards payment of the prevailing wage.
7. Each contractor claiming Davis-Bacon credit for contributions must be prepared to document his costs per employee for the applicable training. The chapter training program should be prepared to assist the contractor in the cost accounting process.

CONCLUSION

Any ABC chapter which sponsors an apprenticeship program should audit its compliance with each of the federal laws discussed above. In addition, there may be state laws relating to the training process which must be complied with. Despite sometimes complicated procedures, merit shop apprenticeship training can be operated successfully, and it is vital to the continued vitality of non-union construction.