Advanced Real Estate Law

Section A Legal Environment of the Real Estate Brokerage

Chapter # 1 The role of a real estate broker, designated broker, managing broker and firm in the context of a real estate transaction and legal duties and obligations to the client and other parties involved

Designated broker – is the title of the person who is recognized by the state and the MLS the responsible member for brokerage transactions. This person is ultimately responsible for the actions of all licensees within the brokerage. Also, with this title, may be certain voting rights at the local MLS and authorization to sign certain documents. When a licensee leaves a brokerage, the designated broker is responsible for signing their license and returning it to the department of licensing in Olympia. There is only one designated broker per brokerage. Branch offices of a brokerage will be required to have a branch manager. The nomenclature for this classification has not changed from the previous classification.

Managing Broker – is the title of a person who may be managing a brokerage or a branch office or a licensee who has the education to manage an office, even if they are currently not doing so. The managing broker is responsible for the supervision of their licensees and responsible for the review of all transactions. The designated broker may also delegate further duties to the managing broker.

Branch Manager- a branch manager is responsible for the affiliates of a branch office. A brokerage must have more than one office to have a branch office. A brokerage with a single office is not considered a "branch". There is one designated broker for all of the branch offices. There is one branch manager per branch office. A branch manager is usually considered a member (not a subscriber as licensees are considered) by most Multiple Listing Services (MLS) and has voting rights in the MLS. Like a designated broker, a branch manager has the duty and authority to:

Supervise affiliated licensees
Hire affiliates
Terminate and "sign off" on licensees' real estate licenses
Review all transactions

Broker – all other licenses not listed above. The name used previously was agent. All "agents" and brokers who renew their license after June 30th, 2010 will need to complete a Transitional Course. This will enable them to acquire the title of broker**.** New licensees will be required to take more course work and clock hours prior to taking their real estate exam. A broker is an agent for the designated broker. All transactions and listings belong to the brokerage and not the licensee.

NOTE: Some of the educational requirements for licensees change after June 30th, 2009. You should keep current on these changes. Further information can be found at:

http://www.dol.wa.gov/business/realestate/renews.html

The distinction between a client and a customer has to do with responsibility and agency. A licensee owes a **client** a fiduciary responsibility of:

Loyalty
Obedience (must be lawful)
Confidentiality
To act in the client's best interest
Disclosure of all pertinent information
To provide a Law of Real Estate Agency Pamphlet

A licensee owes a **client and a customer and other third parties** the following:

To deal honestly and in good faith
Not to be negligent and exercise reasonable skill and care
Account for all monies handled for others
Disclosure of all material facts
To present all offers

Let's look at some examples:

Example # 1

Amy, a broker with ABC Realty, is the listing agent for the Browns. Because she has a listing agreement with the Browns, she has established an agency relationship with the Browns as their broker. During an open house, the Smiths visit the home and want to buy it. Amy decides not to be a dual agent and represent the Brown's solely. She writes up an offer stating that she is representing the Browns and that the buyers are representing themselves. She further advises the Smiths to seek independent legal counsel before signing the contract. While Amy has supplied real estate services to the Smiths by writing up the offer, the Smiths are not her clients. They are her customers

Example #2

John, a broker with XYZ Real Investments, is representing the Gilberts as a buyer's broker. He has a fiduciary responsibility to the Gilberts of loyalty, obedience, confidentiality, disclosure of all pertinent information and to provide a Law of Agency Pamphlet to them.

NOTE: A Law of Agency Pamphlet should be given to a client just as soon as possible. Be sure to have the clients initials the pamphlet.

Chapter # 2 Sources and scope of the various regulations and laws which affect operations of a real estate firm

Federal Agencies that Regulate the Real Estate Industry and the Brokerage

HUD- (Housing and Urban Development) assists home owners by developing various regulations and acts. Some of the divisions within HUD include: Home Improvement Branch, Single Family Housing Program Development, Inspector General's Fraud Hotline, Office of Manufactured Housing Program, Office of Fair Housing and Equal Opportunity (FHEO) and the Office of RESPA and Interstate Land Sales. The following is some basic information found on the HUD homepage:

Buy a home

Avoid Foreclosure

Find Rental assistance

Apply for a Grant

Talk to a Housing Counselor

Get Involved in My Community

File a fair Housing Discrimination Complaint

Making Homes Affordable

HUD Implementation of the Recovery Act

FHA

Public and Indian Housing

More information can be found at:

http://portal.hud.gov/portal/page/portal/HUD/

RESPA – **The Real Estate Settlement Procedures Act (RESPA)** was first passed in 1974 and was established to protect consumers during residential real estate financing transactions. Its main purpose is inform home buyers as to the estimated

and actual costs of **settlement services** (the fees and services involved in completing the lending transaction) and to eliminate unscrupulous practices that can increase the cost of settlement services, including **kickbacks**, unnecessary fees and referral fees for services provided by the affiliated companies. RESPA is regulated by HUD (Housing and Urban Development). Further information can be obtained at:

http://www.hud.gov/offices/hsg/ramh/res/respa_hm.cfm

Department of the Treasury- oversees the Internal Revenue Service (IRS) in relationship to property taxation.

The United States Treasury's Financial Crimes Enforcement Network, (FinCEN) purpose is to protect national security and detect criminal activity and safeguard financial systems from abuse. They investigate money laundering in real estate transactions. The following was taken from FinCEN's website:

FinCEN was created in 1990 to support federal, state, local, and international law enforcement by analyzing the information required under the Bank Secrecy Act (BSA), one of the nation's most important tools in the fight against money laundering. The BSA's recordkeeping and reporting requirements establish a financial trail for investigators to follow as they track criminals, their activities, and their assets. Over the years, FinCEN staff has developed its expertise in adding value to the information collected under the BSA by uncovering leads and exposing unknown pieces of information contained in the complexities of money laundering schemes.

Dirty money can take many routes-some complex, some simple, but all increasingly inventive-the ultimate goal being to disguise its source. The money can move through banks, check cashers, money transmitters, businesses, casinos, and even be sent overseas to become clean, laundered money. The tools of the money launderer can range from complicated financial transactions, carried out through webs of wire transfers and networks of shell companies, to old-fashioned currency smuggling.

FinCEN researches and analyzes this information and other critical forms of intelligence to support financial criminal investigations. The ability to link to a variety of databases provides FinCEN with one of the largest repositories of information available to law enforcement in the country. Safeguarding the privacy of the data it collects is an overriding responsibility of the agency and its employees-a responsibility that strongly imprints all of its data management functions, and indeed, all that the agency does.

FinCEN provides a networking process designed to facilitate information sharing between agencies with shared investigative interests.

Further information can be obtained at:

http://www.ustreas.gov/

US Attorney General- has the authority to enforce criminal or civil Anti-Trust violations. Further information can be found at:

http://www.usdoj.gov/ag/

FBI – Federal Bureau of Investigation- civil actions of Anti-Trust violations may be investigated by the FBI. Further information can be found at:

http://www.fbi.gov/

DOJ – (Department of Justice) administers the Americans with Disabilities Act (ADA) and has the authority to investigate criminal or civil Anti-Trust violations.

The DOJ does a great job of explaining Anti-Trust on their website:

"Antitrust laws protect competition. Free and open competition benefits consumers by ensuring lower prices and new and better products. In a freely competitive market, each competing business generally will try to attract consumers by cutting its prices and increasing the quality of its products or services. Competition and the profit opportunities it brings also stimulate businesses to find new, innovative and more efficient methods of production.

Consumers benefit from competition through lower prices and better products and services. Companies that fail to understand or react to consumer needs may soon find themselves losing out in the competitive battle.

When competitors agree to fix prices, rig bids or allocate (divide up) customers, consumers lose the benefits of competition. The prices that result when competitors agree in these ways are artificially high; such prices do not accurately reflect cost and therefore distort the allocation of society's resources. The result is a loss not only to U.S. consumers and taxpayers, but also the U.S. economy.

When the competitive system is operating effectively, there is no need for government intrusion. The law recognizes that certain arrangements between firms--such as competitors cooperating to perform joint research and development projects--may benefit consumers by allowing the firms that have reached the agreement to compete more effectively against other firms. The law does not condemn all agreements between companies, only those that threaten to raise prices to consumers or to deprive them of new and better products.

But when competing firms get together to fix prices, to rig bids, to divide business between themselves or to make other anticompetitive arrangements that provide no benefits to consumers, the government will act promptly to protect the interests of American consumers."

Further information can be found at:

http://www.usdoj.gov/

FHA – (Federal Housing Authority) Insures loans and offers programs for buyers. From their website:

“The Federal Housing Administration, generally known as "FHA", provides mortgage insurance on loans made by FHA-approved lenders throughout the United States and its territories. FHA insures mortgages on single family and multifamily homes including manufactured homes and hospitals. It is the largest insurer of mortgages in the world, insuring over 34 million properties since its inception in 1934.”

Further information can be found at:

http://www.hud.gov/offices/hsg/fhahistory.cfm

The Federal Housing Finance Agency – created to oversee Fannie Mae and Freddie Mac. From their website:

FHFA Mission

“Provide effective supervision, regulation and housing mission oversight of Fannie Mae, Freddie Mac and the Federal Home Loan Banks to promote their safety and soundness, support housing finance and affordable housing, and support a stable and liquid mortgage market.”

Further information can be found at:

http://www.fhfa.gov/

Commission on Civil Rights, Fair Housing Civil Rights – Administered through HUD.

From their website:

MISSION

“To investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.

To study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.

To appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.

To serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.

To submit reports, findings, and recommendations to the President and Congress.

To issue public service announcements to discourage discrimination or denial of equal protection of the laws."

Further information can be found at:

http://www.usccr.gov/

Federal Emergency Management Agency (FEMA) – oversees Disaster Assistance and Flood Insurance Program.

From their website:

FEMA has more than 3,700 full time employees. They work at FEMA headquarters in Washington D.C., at regional and area offices across the country, the Mount Weather Emergency Operations Center, and the National Emergency Training Center in Emmitsburg, Maryland. FEMA also has nearly 4,000 standby disaster assistance employees who are available for deployment after disasters. Often FEMA works in partnership with other organizations that are part of the nation's emergency management system. These partners include state and local emergency management agencies, 27 federal agencies and the American Red Cross.

FEMA Mission

FEMA's mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.

DISASTER. It strikes anytime, anywhere. It takes many forms -- a hurricane, an earthquake, a tornado, a flood, a fire or a hazardous spill, an act of nature or an act of terrorism. It builds over days or weeks, or hits suddenly, without warning. Every year, millions of Americans face disaster, and its terrifying consequences.

On March 1, 2003, the Federal Emergency Management Agency (FEMA) became part of the U.S. Department of Homeland Security (DHS).

Further information can be found at:

http://www.fema.gov/

U.S. Department of the Interior- oversees the Bureau of Reclamation, Minerals Management Service, Bureau of Land Management, and the Geological Survey. Further information can be found at:

http://www.doi.gov/

Department of Veterans Affairs (VA), (Veterans Benefits Administration Division**) -** guarantees home loans for veterans. VA Home Loans:

A veteran can apply for a VA loan with any mortgage lender that participates in the VA home loan program. At some point, they will need to get a Certificate of Eligibility from VA to prove to the lender that they are eligible for a VA loan. This shows their proof of military service.

According to the VA's website, the following is acceptable proof of military service:

"If you are still serving on regular active duty, you must include an original statement of service signed by, or by direction of, the adjutant, personnel officer, or commander of your unit or higher headquarters **which identifies you and your social security number, and provides** your date of entry on your current active duty period and the duration of any time lost.

If you were discharged from regular active duty after January 1, 1950, a copy of DD Form 214, Certificate of Release or Discharge From Active Duty should be included with your VA Form 26-1880. If you were discharged after October 1, 1979, DD Form 214 copy 4 should be included. **A PHOTOCOPY OF DD214 WILL SUFFICE.....DO NOT SUBMIT AN ORIGINAL DOCUMENT**.

If you are still serving on regular active duty, you **must** include an original **statement of service** signed by, or by direction of, the adjutant, personnel officer, or commander of your unit or higher headquarters which shows your date of entry on your current active duty period and the duration of any time lost.

If you were discharged from the Selected Reserves or the National Guard, you **must** include copies of adequate documentation of at least 6 years of honorable service. If you were discharged from the Army or Air Force National Guard, you may submit NGB Form 22, Report of Separation and Record of Service, or NGB Form 23, Retirement Points Accounting, or it's equivalent. If you were discharged from the Selected Reserve, you may submit a copy of your latest annual points statement and evidence of honorable service. Unfortunately, there is no single form used by the Reserves or National Guard similar to the DD Form 214. It is your responsibility to furnish adequate documentation of at least 6 years of honorable service.

If you are still serving in the Selected Reserves or the National Guard, you **must**

include an original statement of service signed by, or by the direction of, the adjutant, personnel officer, or commander of your unit or higher headquarters showing the length of time that you have been a member of the **Selected Reserves**. Again, at least 6 years of honorable service must be documented."

A veteran may be able to obtain more than one loan:

"Your eligibility is reusable depending on the circumstances. Normally, if you have paid off your prior VA loan and disposed of the property, you can have your used eligibility restored for additional use. Also, on a **one-time only** basis, you may have your eligibility restored if your prior VA loan has been paid in full, but you **still own the property**. In either case, to obtain restoration of eligibility, the veteran must send a completed VA Form 26-1880 to our Winston-Salem Eligibility Center. To prevent delays in processing, it is also advisable to include evidence that the prior loan has been paid in full and, if applicable, the property disposed of. This evidence can be in the form of a paid-in-full statement from the former lender, or a copy of the HUD-1 settlement statement completed in connection with a sale of the property or refinance of the prior loan."

VA Loans are guaranteed by the Veterans Administration and are made available to veterans who can provide a DD214 showing that they have met the service requirements necessary to be eligible for the program. VA guaranteed loans are made by private lenders, such as banks, savings & loans, or mortgage companies to veterans for the purchase of a home **which must be for their own personal occupancy**.

To get a loan, a veteran must apply to a lender. If the loan is approved, VA will guarantee a portion of it to the lender. Using the VA program, a veteran can finance 100% of the purchase price of a home. If the seller of the home is willing to pay the veteran's closing costs, a veteran is often able to purchase with no cash out of pocket. Underwriting guidelines are established by the VA, and generally require the total debt to income ratio (including all reoccurring debts plus housing expense) to not exceed 41% of the borrower's gross income. Only the veteran and his or her spouse may be on the loan. VA loans *are* assumable by another qualified veteran, or if the buyer is not a veteran, the VA eligibility would remain with the house, and the original veteran would not be able to buy again using a VA loan until the original loan was paid off.

Further information can be found at:

http://www.va.gov/

EPA- Publishes "A Brief Guide to Mold, Moisture and Your Home" and" Protect Your Family from Lead in Your Home" pamphlets from their website, is information on what the EPA does:

“EPA leads the nation's environmental science, research, education and assessment efforts. The mission of the Environmental Protection Agency is to protect human health and the environment. Since 1970, EPA has been working for a cleaner, healthier environment for the American people.”

The EPA has their headquarters in Washington, DC, but also has many other regional offices throughout the nation. Washington State is located in region #10. Their website is:

http://www.epa.gov/region10/

Further information can be found at:

http://www.epa.gov/

Federal Trade Commission (FTC) – The FTC promotes competition in the marketplace so that consumers have a wider choice for the goods and services that they purchase. Consumers may file complaints about Anti-Trust violations with the FTC which could result in an extensive investigation and a cease and desist order that would be placed upon the firm or person in violation. Further information can be found at:

http://www.ftc.gov/

Federal Deposit Insurance Corporation (FDIC) -The Federal Deposit Insurance Corporation (FDIC) preserves public confidence in the U.S. financial system by insuring deposits in banks and thrift institutions for at least $250,000. They identify, monitor and address risks to the deposit insurance funds and limit the effect on the economy and the financial system when a bank or thrift institution fails. The FDIC is an independent agency of the federal government and was created in 1933 in response to the thousands of bank failures that occurred in the 1920s and early 1930s. Further information can be found at:

http://www.fdic.gov/

The Federal Reserve Bank (FRB) - The Federal Reserve Bank is the central bank of the United States. It was founded by in 1913 to provide the nation with a safer, more flexible, and more stable monetary and financial system. Further information can be found at:

The Federal Reserve’s duties fall into four general categories:

- conducting the nation’s monetary policy by influencing the monetary and credit conditions in the economy in pursuit of maximum employment, stable prices, and moderate long-term interest rates

- supervising and regulating banking institutions to ensure the safety and soundness of the nation's banking and financial system and to protect the credit rights of consumers

- maintaining the stability of the financial system and containing systemic risk that may arise in financial markets

- providing financial services to depository institutions, the U.S. government, and foreign official institutions, including playing a major role in operating the nation's payments system

An important regulation of the FRB that has a direct affect of the financial and real estate industry is the Truth in Lending Act, known as TILA or Regulation Z. Regulation Z requires uniform methods for computing the cost of credit and for disclosing all credit terms. Below are some of the major regulations for lenders:

Comply with special requirements when advertising credit

Give borrowers written disclosure on essential credit terms including the cost of credit expressed as a finance charge and an annual percentage rate

Respond to consumer complaints of billing errors on certain credit accounts within a specified period

Inform customers of the Right of Rescission in certain mortgage-related loans within a specified period

Further information can be found at:

http://www.occ.treas.gov/handbook/til.pdf

Did You Know? There is a New Statewide Form – Form 22 REG Z
A new form is now available (in Xpress Forms only) to accommodate the recent revisions to Regulation Z of the Truth in Lending Act ("TILA"). Effective July 30, 2009, Regulation Z provides that if the Annual Percentage Rate ("APR") of a buyer's loan differs from the APR initially disclosed to a buyer in a Good Faith Estimate by .125% (.250% in the case of an adjustable rate loan), then the lender must disclose the change in the APR to the buyer at least three days before closing. This means that a buyer may not be able to timely close a transaction if the APR changes as set forth above.

Washington State Real Estate Regulatory Agencies

Washington State Housing Finance Commission – which aids in financing, education for licensees and consumers, promotes affordable housing, and offers tax credits to home buyers. They help finance:

Homeownership

Nonprofit Facilities Bonds

Nonprofit/Multifamily Housing Bonds

Beginning Farmers and Ranchers

Land Acquisition Programs

Low-Income Housing Tax Credit

They also have program information for:

Mortgage and Real Estate Professionals

Compliance Professionals

Preservation and Affordable Housing

Senior Housing Professionals

Bond Investors

Further information can be found at:

http://www.wshfc.org/

Washington State Real Estate Commission- oversees the development and administration of licensing laws and regulations. The following is a copy of their Mission Statement:

"To uphold, protect, and promote the public interest, which embraces both the interests of regulated licensees and entities and the interests of consumers, by the fair and impartial development and administration of the licensing laws and regulations."

Further information can be found at:

http://www.dol.wa.gov/business/realestate/realestatecommission.html

Attorney General of Washington, Consumer Protection Division - the Attorney General leads a team of attorneys who represent state clients and the public interest as directed under state law. From their website:

A key priority for the Attorney General's Office is to safeguard consumers from fraud and unfair business practices by:

- Enforcing consumer protection and antitrust laws, recovering refunds for consumers and imposing penalties and injunctions on offending businesses.
- Educating the public on issues such as identity theft and scams that target seniors, minorities and vulnerable populations.

- Mediating complaints between consumers and businesses at no cost to either party. On average, two out of three complaints filed with our office are satisfactorily resolved.
- Administering Washington's Lemon Law for new motor vehicle warranty enforcement, including arbitration, education, and manufacturer and dealer enforcement.
- Representing consumers who would not otherwise have an effective voice in cases regarding utility company rates and operations.

Further information can be found at:

http://www.atg.wa.gov/SafeguardingConsumers/default.aspx

Department of Ecology State of Washington – oversees shorelands, air and water quality, water, toxic cleanup and toxic hazards. From their website:

Ecology Programs:

Ecology consists of ten major environmental management programs.

AIR QUALITY
Mission: To protect, preserve, and enhance the air quality of Washington to safeguard public health and the environment and support high quality of life for current and future generations.

ENVIRONMENTAL ASSESSMENT
Mission: To measure and assess environmental conditions in Washington State.

HAZARDOUS WASTE AND TOXICS REDUCTION
Mission: To foster sustainability, prevent pollution and promote safe waste management.

NUCLEAR WASTE
Mission: To lead the effective and efficient cleanup of the U.S. Department of Energy's Hanford Site, ensure sound management of mixed hazardous wastes in Washington, and protect the state's air, water, and land at and adjacent to the Hanford Site.

SHORELANDS AND ENVIRONMENTAL ASSISTANCE
Mission: To work in partnership with communities to support healthy watersheds and promote statewide environmental interests. Includes Coastal Zone Management (CZM), Conservation Corps, Federal Permitting, Floods, Ocean Resources, Office of Regulatory Assistance, Padilla Bay National Estuarine Research Reserve, SEPA, Shoreline Management, Watersheds, and Wetlands.

SPILL PREVENTION, PREPAREDNESS, AND RESPONSE
Mission: To protect Washington's environment, public health, and safety through a comprehensive spill prevention, preparedness, and response program.

TOXICS CLEANUP
Mission: To get and keep contaminants out of the environment. Includes Sediment Management and Underground Storage Tanks.

WASTE 2 RESOURCES
Mission: To reduce the amount and the effects of wastes generated in Washington State. Includes the Industrial Section.

WATER QUALITY
Mission: To protect and restore Washington's waters.

WATER RESOURCES
Mission: To manage water resources to meet the current and future needs of the natural environment and Washington's communities. Includes Water Well Log Report Search and Viewer.
Also see the Office of the Columbia River.

Further information can be found at:

http://www.ecy.wa.gov/

Washington State Human Rights Commission, Fair Housing Division- develops and enforces Fair Housing Laws in Washington State. From their website:

Mission Statement

"The mission of the Washington State Human Rights Commission is to eliminate and prevent discrimination through the fair application of the law, the efficient use of resources, and the establishment of productive partnerships in the community."

"The Washington State Human Rights Commission (Commission) enforces the Law Against Discrimination (RCW 49.60). The Commission works to prevent and eliminate discrimination by investigating civil rights complaints and providing education and training opportunities throughout the state."

Further information can be found at:

http://www.hum.wa.gov/

Department of Revenue Washington State- oversees real estate excise tax on sales and water rights transfers. Further information can be found at:

http://dor.wa.gov/Content/Home/Default.aspx

The Governor and State Legislators- develop bills and statutes which effect how real estate is transacted. Further information can be found at:

http://www.governor.wa.gov/

http://www.leg.wa.gov/pages/home.aspx

Local Agencies That Regulate Real Estate

Local MLS- develops and enforces rules and regulations which govern how members cooperate with each other

The Mayor and City Planning Commission - the City Planning Commission usually advises the mayor, city council and city departments on broad planning goals and policies for the physical development of the city

Local Planning and Land Use Bureaus- administers land use permits

City and County Housing Authorities- provide housing assistance and subsidies for low-income residents and seniors citizens.

Local Building Department – zoning restrictions and compliance

County Tax Assessor – responsible for assessing and collecting property taxes

Chapter # 3 Legal and ethical requirements affecting the real estate firm, and describe policies which should be in place to guide compliance

In Section #A, Chapter #2 we discussed the many local, state and federal which affect the legal requirements of a firm. In Section #C Chapter #7 we will also discuss in detail anti-trust and how it relates to the real estate industry and legal requirements.

These legal requirements differ from ethical requirements at times.

For those licensees who are a member of the National Association of Realtors (NAR), NAR has a Code of Ethics and Standards of Practice for all of their members. This code of ethics describes how their members should treat both the public and each other.

The Revised Code of Washington (RCW 18.235.130) also state acts which are unprofessional or unethical which we will discuss in Section # B Chapter #2.

In Washington State we also have the Unfair Business Practices – Consumer Protection Law which is defined in the Revised Code of Washington RCW 19.86.

It states that “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are herby declared unlawful”. And it also states that “It shall be unlawful for any person to monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce”.

Case Study
Ethics of Knowing Your Territory

For you to effectively represent a property professionally and ethically as a real estate professional, you must know and understand the makeup of the territories, neighborhoods and areas in which the properties are located. Knowing the infrastructure: schools, fire stations, police stations, crime rates and more make your clients more comfortable about a particular property and they are more likely to trust your recommendations. Without this information, you will not be representing the properties effectively and could miss vital information that would be important for the client to know in order to make an informed decision. As a matter of professionalism, you should take the time to learn as much as you can about the area in which you work and provide your clients with the information they need.

Chapter # 4 Fiduciary Duties Created in the Operation of a Real Estate Firm

The firm has a fiduciary responsibility to the client. Any funds that may be held in a trust account by the brokerage, for the client, must be handled properly and in accordance with the state laws.

Depending on the form of ownership of the brokerage either the firm or the designated broker owns all of the listings from all sellers.

A licensee is acting as a sub-agent for the brokerage when providing real estate services to their client. The brokerage is the actual agent and thus has all of the fiduciary responsibilities associated with agency law.

Section B License and Agency Law

Upon completion of this section, you should be able to:

Describe the limitations placed on a licensee in preparing listing agreements, buyer agency agreements, purchase and sale agreements, exchanges and options on real property

Demonstrate familiarity with the offenses outlined in RCW 18.85.361 (Grounds for Disciplinary Actions), RCW 18.86.030 (Duties of a Licensee), and RCW 18.235.130 (Uniform Regulations of Business and Professions Act)

Demonstrate an understanding of the provisions of RCW 18.86 – The Real Estate Relationships Act and describe how agency relationships may be created or terminated and identify when disclosure of potential agency conflicts is required

Discuss the issues of vicarious liability and how they may arise from licensee

conduct

Chapter # 1 Limitations placed on a licensee in preparing listing agreements, buyer agency agreements, purchase and sale agreements, exchanges and options on real property

A broker should avoid drafting contracts, contract provisions, or legal documents that could be construed as the product of an unlicensed practice of law. This includes listing agreements, purchase and sale agreements, buyer agency agreements, leases, exchanges and options on real property. Your job is to assist your clients in completing the standard contract forms. Guide your clients by educating them on each of the clauses in the contract and how they might best draft the agreements. Advise your clients to seek proper legal counsel if the contract should extend beyond the standard form, or should your client wish to have a custom agreement drafted.

Use only standard forms in the exercise of your duties. Such forms must be reviewed and approved by real estate attorneys. Use extreme caution in adding anything to these standard forms.

Many brokerages have polices which strictly prohibit licensees from writing in and additional clauses in the contract without management approval. As an agent it is imperative that you understand your brokerage's policies regarding this.

In ***Cultum v. Heritage House Realtors***, the court ruled that licensees need to take great care in using the standardized forms and must ensure that all additions are in line with the terms and conditions of the contract, or the licensee can be held liable to for damages and losses. According to the ruling:

"[An agent] is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the [agent's] business and that such forms will be used only in connection with real estate transactions actually handled by such [agent] as [an agent] and then without charge for the simple service of completing the form."

Check for Understanding Question:

You are writing a Purchase and Sale Agreement for your buyer client. Your client may be exposed to a pay cut or lay off due to some union negotiations. Conversely, he may be eligible for a promotion and a pay increase depending on the union settlement. Your client has written three very detailed paragraphs on this situation and would like it to be a contingency to the contract so that he may not be bound to complete the purchase if certain circumstances should arise. He would like this verbiage to be added to the standard form as an addendum. As the buyer's broker, what is the best course of action that you can take?

A. Encourage the buyer to have their attorney review the Purchase and Sale Agreement and the verbiage that he would like to include.
B. Attach a copy of your client's hand-written contingency to the contract and label it Exhibit "A"
C. Rewrite the contingency into the body of the contract
D. Submit the offer to the seller without the contingency and without the buyer's knowledge

Chapter # 2 Offenses outlined in RCW 18.85.361

RCW 18.85.361
Disciplinary action — Grounds.

In addition to the unprofessional conduct described in RCW 18.235.130, the director may take disciplinary action against any person engaged in the business or acting in the capacity of a real estate broker, associate real estate broker, or real estate salesperson, regardless of whether the transaction was for his or her own account or in his or her capacity as broker, associate real estate broker, or real estate salesperson, and may impose any of the sanctions specified in RCW 18.235.110 for any holder or applicant who is guilty of:

(1) Violating any of the provisions of this chapter or any lawful rules or regulations made by the director pursuant thereto or violating a provision of chapter 64.36, 19.105, or 58.19 RCW or RCW 18.86.030 or the rules adopted under those chapters or section;

(2) Making, printing, publishing, distributing, or causing, authorizing, or knowingly permitting the making, printing, publication or distribution of false statements, descriptions or promises of such character as to reasonably induce any person to act thereon, if the statements, descriptions, or promises purport to be made or to be performed by either the licensee or his or her principal and the licensee then knew or, by the exercise of reasonable care and inquiry, could have known, of the falsity of the statements, descriptions or promises;

(3) Knowingly committing, or being a party to, any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme, or device whereby any other person lawfully relies upon the word, representation or conduct of the licensee;

(4) Accepting the services of, or continuing in a representative capacity, any associate broker or salesperson who has not been granted a license, or after his or her license has been revoked or during a suspension thereof;

(5) Conversion of any money, contract, deed, note, mortgage, or abstract or other evidence of title, to his or her own use or to the use of his or her principal or of any other person, when delivered to him or her in trust or on condition, in violation of the trust or before the happening of the condition; and failure to return any money or contract, deed, note, mortgage, abstract, or other evidence of title within thirty days after the owner thereof is entitled thereto, and makes demand therefore, shall be prima facie evidence of such conversion;

(6) Failing, upon demand, to disclose any information within his or her knowledge to, or to produce any document, book or record in his or her possession for inspection of the director or his or her authorized representatives acting by authority of law;

(7) Continuing to sell any real estate, or operating according to a plan of selling, whereby the interests of the public are endangered, after the director has, by order in writing, stated objections thereto;

(8) Advertising in any manner without affixing the broker's name as licensed, and in the case of a salesperson or associate broker, without affixing the name of the broker as licensed for whom or under whom the salesperson or associate broker operates, to the advertisement; except, that a real estate broker, associate real estate broker, or real estate salesperson advertising their personally owned real property must only disclose that they hold a real estate license;

(9) Accepting other than cash or its equivalent as earnest money unless that fact is communicated to the owner prior to his or her acceptance of the offer to purchase, and such fact is shown in the earnest money receipt;

(10) Charging or accepting compensation from more than one party in any one transaction without first making full disclosure in writing of all the facts to all the parties interested in the transaction;

(11) Accepting, taking, or charging any undisclosed commission, rebate, or direct profit on expenditures made for the principal;

(12) Accepting employment or compensation for appraisal of real property contingent upon reporting a predetermined value;

(13) Issuing an appraisal report on any real property in which the broker, associate broker, or salesperson has an interest unless his or her interest is clearly stated in the appraisal report;

(14) Misrepresentation of his or her membership in any state or national real estate association;

(15) Discrimination against any person in hiring or in sales activity, on the basis of any of the provisions of any state or federal antidiscrimination law;

(16) Failing to keep an escrow or trustee account of funds deposited with him or her relating to a real estate transaction, for a period of three years, showing to whom paid, and such other pertinent information as the director may require, such records to be available to

the director, or his or her representatives, on demand, or upon written notice given to the bank;

(17) Failing to preserve for three years following its consummation records relating to any real estate transaction;

(18) Failing to furnish a copy of any listing, sale, lease or other contract relevant to a real estate transaction to all signatories thereof at the time of execution;

(19) Acceptance by a licensee of a commission or any valuable consideration for the performance of any acts specified in this chapter, from any person, except the licensed managing broker with whom he or she is licensed;

(20) To direct any transaction involving his or her principal, to any lending institution for financing or to any escrow company, in expectation of receiving a kickback or rebate there from, without first disclosing such expectation to his or her principal;

(21) Buying, selling, or leasing directly, or through a third party, any interest in real property without disclosing in writing that he or she holds a real estate license;

(22) In the case of a managing broker licensee, failing to exercise adequate supervision over the activities of his or her licensed brokers within the scope of this chapter;

(23) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetence;

(24) Acting as a vehicle dealer, as defined in RCW 46.70.011, without having a license to do so; or

(25) Failing to ensure that the title is transferred under chapter 46.12 RCW when engaging in a transaction involving a mobile home as a real estate licensee.

A licensee has specific duties by state law:

RCW 18.86.030
Duties of licensee.

(1) A real estate licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

(c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;

(d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate;

(e) To account in a timely manner for all money and property received from or on behalf of either party;

(f) To provide a pamphlet on the law of real estate agency in the form prescribed in RCW 18.86.120 to all parties to whom the licensee renders real estate brokerage services, before the party signs an agency agreement with the licensee, signs an offer in a real estate transaction handled by the licensee, consents to dual agency, or waives any rights, under RCW 18.86.020(1)(e), 18.86.040(1)(e), 18.86.050(1)(e), or18.86.060(2) (e) or (f), whichever occurs earliest; and

(g) To disclose in writing to all parties to whom the licensee renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the licensee, whether the licensee represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate writing entitled "Agency Disclosure."

(2) Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable.

RCW 18.235.130 deals with unprofessional conduct:

RCW 18.235.130
Unprofessional conduct — Acts or conditions that constitute.

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession or operation of the person's business, whether the act constitutes a crime or not. At the disciplinary hearing a certified copy of a final holding of any court of competent jurisdiction is conclusive evidence of the conduct of the license holder or applicant upon which a conviction or the final holding is based. Upon a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. Except as specifically provided by law, nothing in this subsection abrogates the provisions of chapter 9.96A RCW. However, RCW 9.96A.020 does not apply to a person who is required to register as a sex offender

under RCW 9A.44.130;

(2) Misrepresentation or concealment of a material fact in obtaining or renewing a license or in reinstatement thereof;

(3) Advertising that is false, deceptive, or misleading;

(4) Incompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another;

(5) The suspension, revocation, or restriction of a license to engage in any business or profession by competent authority in any state, federal, or foreign jurisdiction. A certified copy of the order, stipulation, or agreement is conclusive evidence of the revocation, suspension, or restriction;

(6) Failure to cooperate with the disciplinary authority in the course of an investigation, audit, or inspection authorized by law by:

(a) Not furnishing any papers or documents requested by the disciplinary authority;

(b) Not furnishing in writing an explanation covering the matter contained in a complaint when requested by the disciplinary authority;

(c) Not responding to a subpoena issued by the disciplinary authority, whether or not the recipient of the subpoena is the accused in the proceeding; or

(d) Not providing authorized access, during regular business hours, to representatives of the disciplinary authority conducting an investigation, inspection, or audit at facilities utilized by the license holder or applicant;

(7) Failure to comply with an order issued by the disciplinary authority;

(8) Violating any of the provisions of this chapter or the chapters specified in RCW 18.235.020(2) or any rules made by the disciplinary authority under the chapters specified in RCW 18.235.020(2);

(9) Aiding or abetting an unlicensed person to practice or operate a business or profession when a license is required;

(10) Practice or operation of a business or profession beyond the scope of practice or operation as defined by law or rule;

(11) Misrepresentation in any aspect of the conduct of the business or profession;

(12) Failure to adequately supervise or oversee auxiliary staff, whether employees or contractors, to the extent that consumers may be harmed or damaged;

(13) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession or operation of the person's business. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is

the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Except as specifically provided by law, nothing in this subsection abrogates the provisions of chapter 9.96A RCW. However, RCW 9.96A.020 does not apply to a person who is required to register as a sex offender under RCW 9A.44.130;

(14) Interference with an investigation or disciplinary action by willful misrepresentation of facts before the disciplinary authority or its authorized representatives, or by the use of threats or harassment against any consumer or witness to discourage them from providing evidence in a disciplinary action or any other legal action, or by the use of financial inducements to any consumer or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary action; and

(15) Engaging in unlicensed practice as defined in RCW 18.235.010.

Chapter # 3 Provisions of RCW 18.86 – The Real Estate Relationships Act and describe how agency relationships may be created or terminated and identify when disclosure of potential agency conflicts is required

Let's look at some ways in which each of these agencies might be formed:

Express Agency: Express agency is created by either an oral or a written agreement between the principal and the broker. It indicates their express intent for this representational status.

In real estate, agency is normally created by either a written listing agreement with a seller, or a buyer agency agreement with a buyer.

An agency relationship which is created after the fact when the Principal agrees to be bound by the actions of another person who was acting without authority is known as an Agency by Ratification and is a type of express agency.

Implied Agency: It is also possible to create an agency relationship by the actions of the parties. If a real estate broker takes on responsibilities that are normally those of a broker, but hasn't signed an agency agreement, she may still be considered an agent via implied agency. By the same token, if the customer asks the agent for advice or actions that are normally those in agency, then an implied agency could be created.

Agency by Estoppel: Also known as Ostensible Agency. An agency relationship created by the actions, behavior or statements of the Principal and/or the Broker upon which a third party relies. Ostensible Agency may be found by a court where no agency relationship was intended by the Principal.

How an Agency Might Be Terminated

Acts of the Parties

Mutual agreement – both parties agree to terminate the agency
Revocation by the Principal – the principal make revoke the agency, however, with certain contracts this may be a breach on the part of the seller and the seller may be liable for damages to the broker or brokerage.

Revocation by the broker – a broker may revoke the agency, however, just as in the case of the principal revoking, the broker may be held liable for damages incurred by the principal

By Operation of Law

Agency term expires- when the term of the agency has expires then the agency automatically expires
Death – the agency is terminated upon the death of the broker or the principal
Incapacity – again the agency is terminated if either party becomes mentally incompetent
Bankruptcy – is most cases the agency is terminated by the bankruptcy of either party
Destruction of the property – if the property is destroyed, the agency terminates

Duties of the Broker After Termination

Even though the agency has terminated, and the broker no longer represents the principal, the broker still has a duty not to disclose any confidential information and to account for all monies that were handled during the agency.

Let's take a look at some situations where potential conflicts of interest could arise from each of the above relationships:

Seller Agency Conflict

The chances of a conflict of interest with seller agency are much rarer than with other types of agencies, but that doesn't imply that none exist. Let's look at an example:

John, a licensee with ABC Realty, has a listing with the Smiths and is the seller's broker. John also has his own home listed for sale at the same time. John's own home is very similar to the Smith's. In the course of performing an open house for the Smiths, John meets a potential buyer. John suggests to the buyer that he should view John's home and tells them that it is a better value and nicer neighborhood. John puts his own best interests before that of the Smiths because he wanted to sell his own home first which is a conflict of interest.

Buyer Agency Conflict

Paige is a buyer's broker for the Gilberts. Paige tours a home with the Gilberts that appears to match all of the Gilbert's criteria. The home also is priced well under market value. Paige discourages the Gilberts from considering the home by telling them that it is in a heavy crime area. Paige later informs her brother that he should buy this home for an investment and that it was a great value. Paige put her family's best interest before that of her buyers' best interest which is a conflict.

Dual Agency Conflict

Jane is a listing broker for the Andersons. Through Jane's advertising of the Anderson's property, Jane finds a buyer for the home. She has obtained written permission from both parties to act as a dual agent. After writing the contract and before presenting it to the Andersons, Jane learns from another broker that there will be another offer coming in which may be very attractive. Jane hurries to the Anderson's home and advises them to sign the first offer where Jane was a dual agent. Jane receives both sides of the commission because she represented both parties. If she had waited to receive the other offer from another broker, she would have only received the listing office portion of the commission. This was a conflict of interest and the sellers may have been able to receive a better offer.

Non-Agency Facilitator Conflict

Maria is writing up an offer for the Gilberts. She has expressed that she is not representing the Jones, both in verbally and in writing. Even though she has done this, the Gilberts really did not understand and thought that Maria was their broker and representing them.

Designated Agency or Split Agency Conflict

Tom, a licensee with ABC Realty has a listing. Pete, another licensee with ABC Realty finds a buyer who would like to purchase this listing. Pete uses a conference room at the brokerage to write up the offer. While doing so, Tom listens in on the conversation that Pete is having with his clients. Tom learns about information which is considered confidential such as the top price that the buyer's are willing to pay. Tom relates this information to his sellers. A major conflict of interest exists here.

Example
Termination of Agency
Destruction of Property

Kyle, a broker with XYZ Realty has a listing with the Gilberts. The Gilberts have a fire which completely destroys their home. Kyle's listing is terminated because of the destruction of the home.

Chapter #4 The issues of vicarious liability and how they may arise from licensee conduct

Let's first look at the code from the state- Revised Code of Washington (RCW) 18.86.090

RCW 18.86.090
Vicarious liability.

(1) A principal is not liable for an act, error, or omission by an agent or subagent of the principal arising out of an agency relationship:

(a) Unless the principal participated in or authorized the act, error, or omission; or

(b) Except to the extent that: (i) The principal benefited from the act, error, or omission; and (ii) the court determines that it is highly probable that the claimant would be unable to enforce a judgment against the agent or subagent.

(2) A licensee is not liable for an act, error, or omission of a subagent under this chapter, unless the licensee participated in or authorized the act, error or omission. This subsection does not limit the liability of a real estate broker for an act, error, or omission by an associate real estate broker or real estate salesperson licensed to that broker.

Now let's look at some real-life examples:

Case #1
The broker for the seller (listing broker) told the buyer that the north property line was exactly where the north fence was located. This was not the case, and in fact, the property line was located 12 feet beyond the fence. In this case, the principal (seller) did not participate in the error and did not benefit from the error and under the vicarious liability code is not liable for the action of their broker. See (1) (a) and (b).

Case #2
A buyer's broker showed a property to the buyers and told them that the above ground detached swimming pool was included in the sale. The sellers had no intention of leaving the pool and the listing broker had specified in the comment section of the listing that the pool was excluded. The listing broker is not liable for the error of the subagent (buyer's broker). See 18.86.100 (2)

Section C Advanced Topics in Real Estate

Objectives

Upon completion of this section, the student should to able to:

Understand the basics of land use

Define encumbrances and easements and encroachments

Understand condominiums, cooperatives and time shares

Understand federal fair housing and anti-discrimination

Define the American with Disabilities Act (ADA)

Know the penalties for violating fair housing laws

Understand Anti-trust and common violations

Explain the real estate settlement and procedures Act (RESPA)

Understand negligence and fraud

Understand contract default (breach)

Explain common clouds on a title

Understand recordkeeping and the handling of trust accounts

Know the rules and laws pertaining to the preparation of contract forms

Understand cancellations, rescissions and terminations

Be able to describe the Washington Residential Landlord Tenant Act and the Manufactured Mobile Home Tenant act

Know the accommodations under the Americans with Disabilities Act

Understand tenancy in common versus joint tenancy

Describe ground leases

Understand condemnation and eminent domain

Describe appurtenances

Understand the importance of Errors and Omissions Insurance

Know what questions that you might ask your broker about E & O Insurance

Understand some of the terms and coverage of E & O Insurance

Understand why a Home Warranty Insurance purchase can be a great risk management tool.

Describe what a home warranty policy might cover

Chapter #1 Land Use

Introduction to Land Use Controls

Zoning

Zoning regulations divide a community into sections or zones that specify the use of property. Example: a parcel could be zoned:

Residential
Commercial
Agricultural
Industrial
Multi- Use

Zoning ordinances regulate such things as:

Building height
Shape and size of a building
Set back regulations (how far the building must be set back from the street and back of the property.
Side yard regulations (how close one building can be to another side building)
Requirements for open undeveloped areas called buffers

There can be certain exceptions the zoning ordinances that include:

Variances
Nonconforming uses
Conditional use
Rezoning

Variances – a variance is granted by local government to build or maintain a structure which falls outside of the zoning ordinance. A variance is granted when the property owner virtually cannot comply with the zoning or would suffer severe hardship in attempting to comply with the existing zoning. In most circumstances only minor variations to the existing zoning ordinances are allowed.

Nonconforming Use

A nonconforming use permit is usually issued when a property was being used for a particular purpose prior to zoning or prior to a zoning change.
Usually, a nonconforming use permit contains certain restrictions for the property owners such as:

A time limit in which to conform to the new zoning (example would be 12 years from the time of the zoning)
Prohibition of rebuilding if the property is destroyed
Prohibition of enlarging the structure

Prohibition of continuance of the permit if the building is abandoned

Example:

Mary and Roger have operated a small grocery store, which is attached to their residence, for 15 years. The zoning in their neighborhood changed to residential only. The city is allowing Mary and Roger to continue to run their grocery store for an additional 15 years after the zoning was changed. They are also prohibited from adding on to the building or rebuilding if the structure is destroyed.

Subdivision Regulations

A parcel of land which had been divided into two or more parcels is a subdivision. There are basically two types of subdivision regulations:

Physical Regulations
The Washington Land Development Act

Physical Regulations

The physical aspects of a subdivision are administered by individual counties or cities within the State of Washington. To subdivide a parcel of land, an individual or company must notify the county. This is done via a submission of a plat map. This plat map must be approved by the city or county. It may be approved as submitted or require certain amendments. A sub-divider may not sell any lots until the plat has been approved.

The plat map may contain information about the utilities, boundaries for the proposed lots, information on sidewalks etc. There are three elements that must be contained in a plat map:

A legal description of the land being subdivided
Dedications to the city of county for such things as streets, sidewalks and utilities
The consent of the landowner for the subdivision

The Washington Land Development Act

This act deals with consumer protection and requires developers who are selling or advertising more than 26 lots to the general public to disclose certain information. This information is contained in a public offering statement that must be given to each purchaser. Examples of information contained in a public offering statement might include:

Information about warranties
Information about any liens against the subdivision
Information about compliance about law use laws

The public offering statement must be given to the prospective purchaser at least two days prior to the purchaser signing a purchase and sale agreement. If a purchase and sale

agreement has already been signed, then the buyer will have two days after the receipt of the public offering statement to rescind (back out of) the contract.

The Land Development Act does not apply to:

Subdivisions with less than 26 lots
Lots which have structures on them
When the lots are sold to builder for development
When all of the lots are sold to one purchaser

Environmental Laws

There are many state and federal environmental laws that impact how a land owner can use his or her land. Among the most common are:

Pollution Control Laws
CERLA
Shoreline Management Act
SEPA
NEPA

Pollution Control Laws

The federal government sets standards for air and water quality and these standards are left to individual states to implement. A permit is required if there is a discharge into the air or water.

CERLA – The Comprehensive Environmental Response, Compensation and Liability Act

CERCLA, commonly known as Superfund, was enacted by Congress on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. CERCLA:

- established prohibitions and requirements concerning closed and abandoned hazardous waste sites;
- provided for liability of persons responsible for releases of hazardous waste at these sites; and
- established a trust fund to provide for cleanup when no responsible party could be identified.

This law authorizes two kinds of response actions:

- Short-term removals, where actions may be taken to address releases or threatened releases requiring prompt response.
- Long-term remedial response actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. CERCLA also enabled the revision of the National Contingency Plan (NCP). The NCP provided the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants.

Shoreline Management Act

The Shoreline Management Act was enacted in 1971, its purpose is to manage and protect the shorelines of the state by regulating development of the shoreline areas. A major goal of the Act is "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines. It also regulates "wetlands" associated with these shorelines. Wetlands compose approximately 2% of the state's total acreage. The Shoreline Management Act is found in chapter 90.58 RCW.

The primary responsibility for administering this regulatory program is assigned to local governments. Local governments have done so through the mechanism of shoreline master programs, adopted under rules established by the Department of Ecology (DOE), that establish goals and policies that are implemented through use regulations. No substantial development is permitted on the state's shoreline unless a permit is obtained from the local jurisdiction. DOE has adopted new shoreline master program guidelines which went into effect January 17, 2004. Cities and counties are required to update their shoreline master programs to be consistent with the new guidelines according to a schedule adopted under 2003 legislation.

SEPA - State Environmental Policy Act

SEPA is a state policy that requires state and local agencies to consider the likely environmental consequences of a proposal before approving or denying the proposal. SEPA is administered by the Washington State Department of Ecology.

The policies and goals in SEPA supplement those in existing authorizations of all branches of government of this state, including state agencies, counties, cities, and districts.

NEPA – National Environmental Policy act

The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision-making processes by considering the

environmental impacts of governmental proposed actions and reasonable alternatives to those actions.

NEPA is administered by the Environmental Protection Agency (EPA)

To meet NEPA requirements federal agencies prepare a detailed statement known as an **Environmental Impact Statement (EIS)**. EPA reviews and comments on EISs prepared by other federal agencies, maintains a national filing system for all EISs, and assures that its own actions comply

Building Codes

The purpose of building codes is to protect the public from unsafe, substandard construction. The intention of the codes is to set standards for methods of constructions and materials used in construction. The permit system is usually used to enforce these codes. The builder or property owner must obtain a permit before starting new construction or major remodeling. A structure that was built before the newer, stricter codes, may, or may not, be required to meet the new code. Once the building has been inspected and it has been determined that all building codes were meet, the city or county issues a certificate of occupancy.

Aspects of Police Power That Enable Public Use and Control of Land

The taking of private land for public use is called condemnation. The right that the government has to condemn property is called eminent domain.
Before the government can exercise its right of eminent domain, it must:

(1) Demonstrate proof that it will have a public use such as a library or park
(2) Pay the owner just compensation which is usually the fair market value of the property

Example:

The City of Mountain Rest wanted to build a park near the intersection of Main Street and 3rd Ave. Three homes were located on the site where the city wanted to place the park. The city specified that the use was for a public park, ordered an appraisal for each home and paid the owners the fair market value of their property. The city also referred these homeowners to a relocation specialist who could help with their future housing needs.

Purpose and Typical Provisions of a Comprehensive Plan

Comprehensive Planning and Growth Management focus on the planning and the implementation of policies to manage land developments and communities within a city or county. This plan is also referred to as a master plan or general plan. This planning is usually carried out by city planning commissions. The purpose of a comprehensive plan is

to manage growth and land use in an organized fashion to benefit the cit or the county and its citizens.

Land use planning and administration in Washington is developed through the Growth Management Act (GMA) of 1990. The goals of this acct are to:
Under this act, counties must, at a minimum address:

Designation or urban growth areas
Contiguous and orderly development and providing urban services
The sighting of major public capital facilities
Transportation strategies and facilities
Affordable housing needs and distribution
Facilitation of joint planning
Economic development and employment

Growth Management is accomplished through zoning, building codes, subdivision regulations, and environmental regulations.

Private Land Use Control Through Deed Restrictions

Restrictions placed in a deed control the use of the property.

Before buying a home, it's important to understand the restrictive covenants and other deed restrictions that are in place for the real estate you want to buy, because they dictate how you can and cannot use the property.

Restrictive covenants are deed restrictions that apply to a group of homes or lots, property that's part of a specific development or subdivision. They are normally put in place by the original developer and are different for every area of homes.

The Problem with Deed Restrictions

The problem with Deed Restrictions: The biggest weakness of deed restrictions is that they do not have a third party that can be designated to monitor and enforce the restriction. The law limits who can enforce restrictions and the length of time. For example, if you have restrictions in your deed and you then sell the property or give the land away without owning or keeping land nearby, your restrictions may not be enforceable by you, your heirs, or future owners!

Landowners may make formal and informal agreements without involving a conservation organization or government agency. Verbal agreements between neighbors, deed restrictions, and mutual covenants among the members of a homeowner’s association are a few of the most popular agreements. There is very little security that the land will be permanently protected as the restrictions depend on the interests of the private parties. There is no third party to legally enforce the agreements and there are no tax advantages for landowners who choose one of these methods.

Enforcing deed restrictions can be difficult, as they are only enforceable by the prior owner or a third party to the original transaction, such as the owner of abutting property. One way

to ensure continued enforcement is to have a third-party entity, like a Community Stewardship Organization or Land Trust, in the transaction. Deed restrictions should only be used with professional legal advice. For landowners seeking to permanently protect their property, Conservation Easements may be an alternative.

Chapter # 2 Encumbrances and Easements and Encroachments

Encumbrances

An encumbrance is an interest or right that a person has on another person's property. This interest is nonpossessory. Examples would include liens and deed restrictions.

Liens

Liens are the most common type of encumbrance. Liens are monetary claims against a property to collect a debt from the property owner. Examples of liens could be a mechanics lien, a material-person's lien, tax lien or mortgage lien. Court action can also create a lien. In section # 19 we will discuss liens in further detail.

Encroachments

Encroachments are physical and arise when a structure is built totally or in part on a neighbor's property. They usually involve confusion or a dispute regarding boundary lines. They could be caused by an incorrect survey or a mistake by the builder or a mistake from the person erecting the building.

Encroachments could be corrected by removing the structure that is encroaching a property. Other ways to correct an encroachment would include selling a portion of the land to the encroaching party, granting a lease to the encroaching party for a period of time or granting an easement to the encroachment.

Example

The Anderson's have a large overhang off of their roof. The overhang "hangs" over the property line of their neighbors, the Browns. Rather than attempting to buy property from the Browns to alleviate the encroachment, the Anderson's decide to cut off part of the overhand on their roof so that it doesn't cross the property line.

Chapter #3 Condominiums, Cooperatives and Time Shares

Cooperatives

A housing cooperative is formed when people join together to own or control the housing and/or related community facilities in which they live. Usually they do this by forming a not-

for-profit cooperative corporation. Each month they simply pay an amount that covers their share of the operating expenses of their cooperative corporation. Personal income tax deductions, lower turnover rates, lower real estate tax assessments (in some local areas), controlled maintenance costs, and resident participation and control are some of the **benefits** of choosing cooperative homeownership.

The main distinction between a housing co-op and other forms of homeownership is that in a housing co-op you don't directly own real estate. But if you don't own real estate, what exactly are you buying? You are buying shares or a membership in a cooperative housing corporation. The corporation owns or leases all real estate. As part of your membership (being a shareholder) in the cooperative you have an exclusive right to live in a specific unit (this is established thorough an occupancy agreement or proprietary lease) for as long as you are a member of the co-op, as long as you don't break any of the rules or regulations of the cooperative. As part of your membership, you also have a vote in the affairs of the corporation.

There are three different types of housing cooperatives as far as equity is concerned:

Market-rate housing cooperatives
In a market-rate cooperative you can buy or sell a membership or shares at whatever price the market will bear. Purchase prices and equity accumulation are very similar to condominium or single-family ownership.

Limited-equity housing cooperatives
In a limited-equity housing cooperative (LEC) there are restrictions on what outgoing members can get from sale of their shares. These are usually imposed because the co-op's members benefit from below-market interest rate mortgage loans, grants, real estate tax abatement, or other features that make the housing more "affordable" to both the initial and future residents for a specified period of time. In some co-ops these limitations are voluntarily imposed by the members. These restrictions are usually found in the cooperative's bylaws. The documents may also establish maximum income limits for new members to further target the special benefits of the housing to families who need them the most.

Leasing cooperatives (or zero-equity)
In a leasing cooperative, the cooperative corporation leases the property from an outside investor (often a nonprofit corporation that is set up specifically for this purpose). Since the cooperative corporation does not own any real estate, the cooperative is not in a position to build up any equity (just as a tenant doesn't build any equity). However, as a corporation, the cooperative is often in a position to buy the property if it comes up for sale later and convert to a market rate or limited-equity cooperative. And some leasing cooperatives allow outgoing members to take with them at least part of their share of the cash reserves built up by the cooperative corporation while they were in occupancy.

Condominiums

A condominium is one of a group of housing units where each homeowner owns their individual unit space, and all the dwellings share ownership of areas of common use.

A townhouse is a type of condominium which is usually two stories.

The individual units normally share walls, but this isn't a requirement. The main difference between condos and single homes is that there is no individual ownership of a plot of land. All the land in the condominium project is owned in common by all the homeowners.

Usually, the exterior maintenance is paid for out of homeowner dues collected and managed under strict rules. The exterior walls and roof are insured by the condominium association, while all interior walls and items are insured by the homeowner.

In a condominium, the owner has individual title to the inside space of his unit. Sometimes the space is described as beginning with the paint on the walls. The unit owners also have an undivided interest in the physical components of the buildings and land. The legal definition of condominium is: The absolute ownership of a unit based on a legal description of the airspace the unit actually occupies, plus an undivided interest in the ownership of the common elements, which are owned jointly with the other condominium unit owners.

Condo projects that are built as multi story apartments are usually recognizable as condos because they don't have land under each unit. In these developments, the condominium association normally maintains the exterior of the building and common grounds, but not the interiors of the units. An insurance policy is usually held by the association to cover the jointly owned parts of the property, while the individual owners carry insurance for the interior components of their unit. The owners pay a fee to support the maintenance of the common areas. A condo association is formed to make decisions about the expenditures for repairs, handle administrative work and manage the common areas of the project.

While some condo projects look like lofts or apartments, others may look like duplexes, garden homes or residences on regular lots. Generally, creating a condo development allows the developer to get more density approved than he would if he/she had built single ownership lots. This is usually the reason why a condo development is chosen over the single ownership of lots. It is possible that a condominium may just be two units of a duplex. In this case the two owners may jointly make decisions concerning maintenance of any common areas. By setting up the units of a duplex as two condos, the owner is able to sell them separately to two different owners.

Many times, an owner of apartment buildings will convert the apartments into condominiums. There are regulations regarding this conversion process to help protect the existing tenants who may be displaced.

Common areas of a condominium project are the entire development minus the individual units owned by the home owners. The owner of the units has the right to use the common areas such as using the step, elevator, swimming pool, spa, club house and so on. A specific fraction or percentage of the interest in the common areas are specified in a condominium declaration. The percentages assigned to the units may be equal or unequal.

Example #1 Equal Interests on Common Areas

There are 50 condominium units. Each unit owns 1/50 percentage of an undivided interest in the common areas.

Example #2 Unequal Interests on Common Areas

There are 50 condominium units ranging from 600 square feet to 1800 square feet. Some units have water views, and some do not. The larger units and units with a view (the more expensive units) may have a greater percentage of an undivided interest in the common areas.

When a condominium unit is sold the common interest is automatically sold to and cannot be separated.

Note: Condominiums versus Town Homes in Washington State – Both condominiums and town homes are considered to be a "condominium" in this state. Many residents in Washington refer to a unit that is on one level as a condominium. If a unit is on more than one level (has a staircase or elevator within the unit) then it is referred to as a town home.

Timeshares

A time share is another type on condominium. Instead of purchasing the entire right to the unit, the purchaser buys a period of time of ownership in the unit. Most timeshares are found in vacation or resort areas.

Example

The Gilberts like to vacation in Colorado in the winter where their family can ski. They don't want the expense of owning a condominium there for all year long, as they only

want to use a condominium for two weeks of the year. They purchase a condominium timeshare which allows then the use of the unit for two weeks per year.

In general, there are 3 types of timeshare ownership:

Tenancy in Common – where all purchasers have an undivided interest in a unit

as tenants in common

Interval Ownership – where the purchaser is granted an estate for years for a

specific time each year

Right to use or license – where the developer retains the ownership of the

timeshare unit and allows the use of the unit for a specified time

Further information on timeshares can be found at The Laws and Rules in Washington state through the Revised Code of Washington (RCW's) and the Washington Administrative Code (WAC's):

RCW 64.36: Timeshare regulation

WAC 308-127 Timeshares

RCW 19-170: Promotional advertising and prizes

RCW 19.235: Uniform Regulation of Business professions

Chapter #4 Federal Fair Housing and Anti-Discrimination

Civil Rights Act of 1968 and 1988 Amendment

In leasing or selling residential property, the Civil Rights Act of 1968 expands the definition of discrimination to include not only race, but also national origin, color, and religion. The Fair Housing Amendments Act of 1988 further broadens the definition to include age, sex, and handicapped status.

Fair Housing Act

The federal Fair Housing Act of 1988 and Title VIII of the Civil Rights Act of 1968 constitute the Fair Housing Act. The Act makes fair housing a national policy throughout the U.S. It prohibits discrimination in the sale, lease or rental of housing, or making housing otherwise unavailable because of race, color, religion, sex, disability, familial status or national origin.

Section 109 of Title I of the Housing and Community Development (HCD) Act of 1974

The following was taken from the HUD site:

Summary:

"Section 109 of the HCD Act of 1974, Title I, prohibits discrimination based on race, color, national origin, disability, age, religion, and sex within Community Development Block Grant (CDBG) programs or activities."

"The Community Development Block Grant (CDBG) program is a flexible program that provides communities with resources to address a wide range of unique community development needs. Beginning in 1974, the CDBG program is one of the longest continuously run programs at HUD. The CDBG program provides annual grants on a formula basis to 1180 general units of local government and States."

Purpose:

In addition to its responsibility for enforcing other Federal statutes prohibiting discrimination in housing, HUD has a statutory obligation under Section 109 to ensure that individuals are not subjected to discrimination based on race, color, national origin, disability, age, religion, or sex by recipients of CDBG funds. Section 109 charges HUD with enforcing the right of individuals to live in CDBG-funded housing free from such discrimination."

Type of Assistance:

"Section 109 provides for HUD's investigation and remediation of housing discrimination complaints."

Eligible Customers:

"Any person who feels himself or herself a victim of housing discrimination based on race, color, national origin, disability, religion, or sex in a CDBG-funded project may file a

complaint with HUD under Section 109. During fiscal year (FY) 1995, HUD received 38 complaints under Section 109. In FY 1996, 103 complaints were received."

Eligible Activities:

"Section 109 investigates complaints of discrimination based on race, color, national origin, disability, religion, and sex."

Application:

"Individuals may send complaints to one of HUD's regional Fair Housing Enforcement Centers or Program Operations and Compliance Centers or to HUD's Office of Fair Housing and Equal Opportunity."

Technical Guidance:

"Section 109 activities are authorized under Title I of the HCD Act of 1974, as amended. These activities are administered by HUD's Office of Fair Housing and Equal Opportunity. Contact Betsy Ryan at (202) 708-0404."

For More Information:

Government resources:
-- "The Fair Housing Information Clearinghouse, at 1-800-343-3442 or 1-800-290-1617 (TTY), supplies national and local information and links to fair housing resources inside and outside of Government".
-- "**HUD Fair Housing Webpage** provides information about the programs of the Office of Fair Housing and Equal Opportunity".

Executive Order 11063 (1962), as amended by 12259 (1983)

Executive Order 11063
Equal opportunity in housing

- Signed: November 20, 1962 by John F Kennedy
- Amended by: EO 12259, December 31, 1980 by Jimmy Carter
- Originated by the President's Committee on Equal Opportunity in Housing to promote leadership and coordination of Fair Housing in Federal Programs

Chapter #5 American with Disabilities Act

Major Provisions of the Americans with Disabilities Act

The Americans with Disability Act (ADA) of 1990 provides nondiscrimination protection for individuals with disabilities in the areas of employment, public services, transportation,

access to public facilities and telecommunications. As stated in the Act, its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Most of the ADA provisions took effect in 1992.

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

The ADA requires that no one can be discriminated against because of a disability to accessibility in any place of public accommodation. A public accommodation is a public or private entity which is open to public for commerce. The ADA requires the following to be accomplished, as long as it is “reasonably achievable”. Please refer to section I of this chapter on Title III of ADA:

New construction, when not structurally impossible, must be made accessible to people with disabilities

Items that would be a barrier for architectural issues and communication issues must removed so that god and services can be accessed by folks with disabilities

Auxiliary aids and services must be provided so that no one who had a disability is excluded or treated different from other people

Chapter # 6 Penalties for Violating Fair Housing Laws

Who can file a complaint?

Anyone who has been harmed by a housing action may file a fair housing complaint. Fair housing laws also protect anyone who is harmed because they associated with members of a protected class. For example, if a housing provider treated a Caucasian tenant negatively because the tenant had Russian guests, both the tenant and the guests would be able to file complaints. Fair housing advocacy organizations may also file a complaint. Also, enforcement agencies have the authority to file a complaint without a complaining party, where a fair housing violation has occurred.

Penalties for violations of the Fair Housing Act shall be fined in accordance with the violations committed, the consequences to the damaged party, weather the parties settled the alleged violation themselves or whether there was an investigation. Some of the consequences that a person or firm that was found in violation of the Fair Housing Act might be:

Monitoring for a year from the civil rights agency – this might include providing access to the firm, records, employees etc.

Monetary damages to the injured party

Civil damages

The posting of a Fair Housing Poster in a place of business

A change of polices and procedures within a firm. These could include:

Changes to procedures manuals, with additional sections added for non-harassment or discrimination

Training for employees and management

Changes in advertising procedures

Post the fair housing logo on printed material

Chapter #7 Anti Trust

An Introduction

Anti-Trust Laws and Unfair Business Practices are designed to promote the policy and practice of COMPETITION. Some of the symptoms of a lack of competition are higher pricing and diminishing quality of a service or product.

Real Estate Agents compete with one another to obtain listings for sale. At the same time, they often cooperate with one another to secure buyers for those listings. This dual situation of competition and cooperation, which is unique to the real estate industry, can present many opportunities for Anti-Trust violations.

In light of this risk, the National Association of Realtors (NAR) has produced a 16-minute video entitled “Anti-Trust and Real Estate” which can be obtained through NAR or viewed from the Northwest Multiple Listing web site. This informative video explains the basis for Anti-Trust Laws and how the pertain to you as real estate professionals.

The foundation for federal Anti-Trust laws is the Sherman Act of 1890.

The Sherman Anti-Trust Act (1890)

The Sherman Antitrust Act (1890)

Section 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

NOTE: The emphasis of this act is to prohibit the restraint of trade to allow for greater competition

Washington State Unfair Business Practices

In Washington State we have the Unfair Business Practices – Consumer Protection Law which is defined in the Revised Code of Washington RCW 19.86.

It states that "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are herby declared unlawful". And it also states that "It shall be unlawful for any person to monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce".

The Three Types of Anti-Trust violations which are Most Important in the Real Estate Industry

Conspiracy to Fix Prices

Imbalanced Commission Splits

Conspiracy to Boycott

Conspiracy to Fix Prices – It is a violation of both State and Federal Anti-Trust Laws for there to be ANY agreement between competing real estate brokers to fix the prices that each will charge to a third party.

Let's look at some examples regarding Conspiracy to Fix Prices:

The following examples are <u>prohibited</u>:

Brokerage A an Brokerage B agreed to charge all their clients x% commission on all listings.

Brokerage A, brokerage B and Brokerage C agreed to pay a set amount to outside brokers for any referral

Brokerage A tells her clients that her brokerage charges 6% commission on all their listings and that all other brokers charge the same amount as it is a “standard” in the industry.

This prohibition is not just limited to the prices that the brokerages will charge to sellers but can also include agreement of referral fees among agents and commission splits (as we will explore in the next lesson).

Imbalanced Commission Splits – Agents need to be especially careful of imbalanced exploitative splits when cooperating with other agents on listings. As exploitative split is one that:

(a) Minimizes the agent’s costs of cooperation with other agents

(b) Maximizes the agent’s commission because they sell their own listings

(c) Maximizes the agent’s commission when they sell other agent’s listings

Here’s an example of an imbalanced commission split:

A listing agent offers 1% to buyer’s agents who sell his or her listings. Yet the broker seeks 3% of the commission when he or she sells the listing of other brokers who have 6% total commission.

This splitting structure discourages cooperation from other agents and increases the likelihood that the broker can sell his or her own listing.

Conspiracy to Boycott – The conspiracy to boycott happens when a group of competitors agree not to deal with another firm or when brokers collectively decide not to deal with a third party to eliminate competition. Here’s an important distinction:

Individuals each have a right to choose who they will and will not do business with. It is the collective action of group which is prohibited by Anti-Trust Laws.

Case Study

Over a lunch meeting, Agent A from XYZ Realty and Agent B from ABC Realty agree not to show the listings of Making Realty. They further state that if no other brokers will show the Making Realty listings than Making should be out of business in no time. This is a conspiracy to boycott to eliminate competition.

Penalties for Anti-Trust Violations

The Department of Justice – The U.S. Attorney General many enforce criminal or civil Anti-Trust Violations. Civil action may be investigated may the FBI and criminal actions may be investigated through a grand jury.

A corporation that is found guilty may be fined up to $10 Million.

An individual that is found guilty may be fined up to $ 350,000.

Private Causes of Actions -

Persons or firms that have been injured by Anti-Trust Violations may recover treble (three times) their actual damages and reasonable attorney's fees.

An injunction may be placed to prohibit further activities.

The Federal Trade Commission (FTC) - a complaint filed with the FTC could result in an extensive investigation and a cease and desist order could be placed upon the person or firm in violation.

Court Supervision – The courts may have the right to supervise the business that is in violation for up to 10 years

Loss of Brokerage or Real Estate License - It is possible for a brokerage or an individual to lose their license to practice real estate.

Anti-trust Issues and Non-Traditional Brokerages

Especially within the last few years, many non-traditional brokerages have emerged. These brokerages may provide limited service, rebates or internet-based service for their clients.

It is important for traditional brokerages, as well as non-traditional brokerages, not to conspire to boycott other brokerages. This is not only because of Anti-Trust issues, but also in fair dealings with the public and their fiduciary responsibility to their clients.

Case Study

A broker was touring a group of homes with his buyer clients. He had prepared a list of 6 homes to tour. While viewing one of the homes the clients see a home next door to one of the listings and inquire about viewing this home as well. Their broker explains that this home is listed with a limited service company and that all traditional brokerages were refusing to show homes listed by these brokerages with non-traditional business models.

This falls under the category of Conspiracy to Boycott and is illegal.

Chapter # 8 The Real Estate Settlement and Procedures Act

Introduction

The Real Estate Settlement Procedures Act (RESPA) was first passed in 1974 and was established to protect consumers during residential real estate financing transactions. Its main purpose is to inform home buyers as to the estimated and actual costs of settlement services (the fees and services involved in completing the lending transaction) and to eliminate unscrupulous practices that can increase the cost of settlement services, including kickbacks, unnecessary fees and referral fees for services provided by the affiliated companies.

Affiliated Companies

During the real estate transaction, there will be many different entities that will have a role in the successful sale of the property and providing settlement services. The borrower may receive referrals to these providers.

Some of these providers are:

- Secondary Lending Agencies
- Credit Reporting Agencies
- Appraisers
- Attorney
- Title Companies
- Escrow Companies
- Home Inspectors
- Inspectors Specializing in Environmental Issues
- Comprehensive Loss Underwriting Exchange (CLUE)

- Insurance Companies

The issue arises when the referring company, usually the lender, and the provider have an affiliate business relationship, meaning both companies have some type of business link or common ownership. For example, a parent company owns both the lending company and the appraisal company.

However, unscrupulous companies may use these affiliate relationships to collect additional fee income from an unsuspecting home buyer. For example, if a lender has an appraisal subsidiary and then refers a home buyer to that appraiser and charges an additional fee for their appraisal service, the lender also benefits by the referral. Lenders may discourage buyers from seeking other, less costly appraisers in order to ensure that additional income for themselves. If the home buyer did not know the relationship between the lender and the appraiser existed, they may not know about the mutual benefits between the companies.

Disclosures for Affiliated Companies

An Affiliated Business Arrangement (AfBA) Disclosure informs the purchaser of the exact nature of the affiliation between the referring party and the provider being referred. This disclosure is only required when a settlement service provider refers the home buyer consumer to a provider with whom the referring party has an ownership or other beneficial interest.

The disclosure must be given to the home buyer at or prior to the time of referral.

Compensation Under RESPA

Section 8 of the RESPA regulations state:

> **"(a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.**
>
> **"(b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 USC 2607(a) and (b)"**

RESPA allows companies to charge fees for actual services performed, such as attorney's fees, title search fees, appraisal fees, etc. along with fees for mortgage brokers and real estate agents.

RESPA Disclosures

Real Estate Settlement Procedures Act ("RESPA") requires lenders to provide your home buyers with additional disclosures to inform them about the types of services

that will be provided as part of the transaction and the costs involved with those services. Disclosures detail such things as settlement cost, lender servicing, escrow practices, and business relationships between different settlement providers.

The initial disclosures are as follows:

- The Good Faith Estimate along with the “Buying Your Home – Settlement Costs and Helpful Information Booklet” (HUD)
- ARM Disclosure
- Servicing Transfer Disclosure
- Initial Escrow Account Statement
- Affiliated Business Arrangement Disclosure (discussed previously)

These initial disclosures must be given to the home buyer within three business days of the application.

The Good Faith Estimate

The Good Faith Estimate provides an estimate of the settlement costs and names of all required service providers. These estimates include all pre-paid and escrow items as well as lender charges.
Certain fees listed on a Good Faith Estimate are used to calculate the Annual Percentage Rate (APR). These fees are added with the regular interest payments to come up with a total cost. This total is then converted to a percentage (APR) and is considered to be the true cost of borrowing money to purchase or refinance a home.

Along with the Good Faith Estimate, the lender must also supply a booklet published by the Department of Housing and Urban Development, called the “Buying Your Home – Settlement Costs and Helpful Information Booklet.” This booklet explains all of the costs indicated on the Good Faith Estimate and gives the borrower a clear understanding of all the costs they will incur.

At the closing of the loan, a final settlement statement will be given to the borrower that lists the actual costs of each charge. This is called the Uniform Settlement Statement or HUD 1.

ARM Disclosures

Whenever a borrower applies for, or inquires about an adjustable rate mortgage, RESPA requires a separate disclosure be given along with the Consumer Handbook on Adjustable Rate Mortgages. The adjustable rate program disclosure provides detailed information about an Adjustable Rate Mortgage, including the terms of a sample loan and historical examples.

Servicing Transfer Disclosure

This disclosure statement explains that the lender may transfer servicing of the loan to another lender. The statement must be presented to the borrower(s) at application or within three business days of application.

Initial Escrow Account Statement

RESPA requires that an initial escrow account statement be prepared for all loans that have an escrow account (i.e., an account used for property taxes and hazard insurance). This statement itemizes escrow expenses for the first 12 months of the loan and is presented to the borrower at closing.

Chapter # 9 Negligence and Fraud

Negligence- negligence is defined as the failure to use ordinary or standard care. Let's look at a case study:

Case Study

The buyers wanted to purchase a vintage older home which was on a septic system. The buyer's agent did not recommend that the buyers have a structural inspection or an inspection of the septic system. After closing, the buyers moved in and found massive dry rot under the eaves of the home and found that the drain field for the septic system was defective and that sewage was seeping up under the back lawn. The broker was sued for negligence for not recommending a structural inspection.

Unintentional Misrepresentation

Let's look at an example:

The buyer's agent stated that an in-ground pool could be built in the backyard of a home and that the home would be perfect for this family who had a child who was training to be an Olympic swimmer. After the buyers moved in, they found that there were underground utilities in the backyard and a pool could not be built there. The buyers sued their agent for unintentional misrepresentation. Then the buyers sued the broker for unintentional misrepresentation as well.

Negligent Misrepresentation

Negligent Misrepresentation is a failure to disclose a material fact out of ignorance when the agent should have known otherwise. This is where the agent makes a statement without any reasonable grounds to believe that it is true. Here's an example:

Due to a recent earthquake, many homes in a particular neighborhood suffered major structural damages. The two homes next door to the subject property still were being repaired and each still had scaffolding around them. While the sellers did not disclose

this fact on their seller's disclosure statement, they did tell their agent about the earthquake. The broker failed to advise the buyers of the potential problems with the structural integrity of the home and said that he thought the structure was just fine. The broker was found liable for failing to disclose the potential problems.

Intentional Misrepresentation

Intentional Misrepresentation is defined as "knowingly making a false statement about a material fact". **It is also known as fraud**. Claims of intentional misrepresentation would include:

Knowledge by the agent that the information was false

Damage to a consumer who relied on this false information

Example:

Listing broker knew that there were external factors which influence the habitability of a home. The seller had discussed the fact that because their home backed up to a super market, semi –trucks making deliveries at 4am in the morning were a noise nuisance. The broker represented to the buyers that this home was in a quiet neighborhood. After the buyers moved in they were awakened by the noise of the trucks and sued the broker for intentional misrepresentation.

Intentional Concealment

Intentional Concealment is defined as "knowingly failing to disclose a material fact". Claims of intentional concealment may include some of the following circumstances:

A material fact was concealed or suppressed

The fact was concealed with an intention to defraud

An agent has the duty to deal fairly with all parties even if he/she does not represent them.

The consumer was damaged as a result of the concealment

Example:

The listing broker had seen a burned area of approximately 6 feet in diameter on the hardwood flooring on the porch. An oil lamp had burned through the hardwood and part of the sub-flooring. The broker placed a large fluffy area rug over the area to conceal the defect. When the new buyers moved in, they discovered that the sub-flooring, which was particle board, had rotted from exposure and moisture. The buyers sued the broker for intentional concealment.

Note on Vicarious Liability - Licensees are agents for their designated broker. Under some circumstances, a designated broker may be liable for the wrongful actions of a licensee under his or her supervision.

Vicarious liability is defined as "a person that is responsible or liable for the actions of another person".

The theory behind vicarious liability is that the designated broker should not benefit from the fraudulent or misrepresentations of their licensees.

Chapter # 10 Contract Default

Default (Breach) and the Rights of Both Parties

A breach of contract is when one or both parties fail to perform according to the terms and conditions of the contract. If there has been a material breach (meaning that the beach was important to one of the parties), then the other party may be able to take court action.

There are four legal remedies for a breach of contract which include:

Specific Performance

Liquidated Damages

Compensatory Damages
Rescission

Let's take a look at the remedies in more depth:

Specific Performance- is a legal action where the court orders the party who breached the contract to perform according to the contract. In the circumstance of a Purchase and Sale Agreement, the seller would be obligated to sell the property as promised and deliver the deed to the buyer and the buyer would be obligated to purchase the property as promised. Specific performance, as a remedy may not always be possible.

Case Study Example

John and Sallon had a contract with the Coemer Company, a retailer, to purchase an air conditioner. The manufacturer of this specific model air conditioner went out of business and the Coemer Company could not deliver the unit as per the contract. In this case, a remedy of specific performance would not be possible since this particular model of air conditioner was no longer available.

Liquidated Damages – when both parties to a contract agree in advance to a dollar amount that will compensate the other party in the event of a breach, this is considered liquidated damages. This amount must be set forth in writing. There are

two important points to remember about liquidated damages: Firstly, it limits the amount that the non-breaching party can recover. Secondly, it makes it easier for the non-breaching party to recover these damages since they were agreed to in writing in advance.

In a Purchase and Sale Agreement (PSA) contract it is common that the parties will agree to the amount of earnest money being offered as liquidated damages.

Example

The Andersons (the sellers) and Browns (the buyers) have a mutual acceptance on a purchase and sale agreement. The Browns have submitted an earnest money check for $5,000. On page one of the contract, on the "Default" line, the box was checked stating: "Forfeiture of Earnest Money". If the Browns default on the contract, they will lose their earnest money of $5,000. However, the Andersons cannot sue for additional money as the $5,000 was agreed to in advance and served as liquidated damages.

Compensatory Damages - the most common remedy for a breach of contract, given that there was not a liquidated damages clause, is compensatory damages. This compensates the other party for the financial loss that they incurred because of a breach of contract. The amount awarded is usually intended to place the non-breaching party in a financial position that they would have been placed in if the breaching party had performed as per the terms of contract.

Example

Mr and Ms. Gilbert, the sellers, have mutual acceptance on a purchase and sale agreement with the Ms. Smith, the buyer. There is not a clause in the contract for liquidated damages. Ms. Smith, the buyer, defaults on the contract. The Gilberts attempt to sue Ms. Smith for the following:

A total of $10,900 broken down as such:

$8,000 which is the money that the Gilberts will loose on the earnest money on the next house that they are purchasing (since they will have to default on this contract)

$400 that they will lose for a deposit with the moving company

$2500 in attorney fees

Rescission – as mentioned earlier, a rescission takes place when a contract has been cancelled and each party is returned to their original position.

If a Purchase and Sale Agreement were to be rescinded, then the buyer would forfeit the right to purchase the property and the seller would refund the earnest money to the buyer. A rescission could result from the agreement of the parties or by court order.

Chapter # 11 Common Clouds on a Title

Boundary Issues – boundary issue could easily disrupt a real Estate transaction. Some of the more common boundary issue might be:

Encroachments
Easements
Fences
Hedges etc.

Frequently, a survey, such as an ALTA Survey, can clear up these issues. An ALTA survey will disclose where the structures and usage of the property are located in relationship to the property lines.

If a survey raises questions about boundary lines, then the following are some of the more common way in which to resolve them:

Boundary line adjustment
The granting of an easement
Seeking legal advice from an attorney on how to solve the issues

Bankruptcy – any legal issue could disrupt a transaction including bankruptcy. In a bankruptcy, trustees, bankruptcy attorneys and bankruptcy courts are involved. A court order may be needed to sell the property or if in foreclosure an order of abandonment might be needed.

Bankruptcies affect real estate brokers. For example, listing brokers are typically hurt when their short payoff sellers file bankruptcy. It is now common for a buyer's agent to discover that a builder/seller has filed bankruptcy. The initial effect of filing bankruptcy is that the borrower's assets become property of the bankruptcy estate. When a borrower files bankruptcy, the law creates an "automatic stay" that initially freezes creditors from doing anything to pursue the borrower or the borrower's assets outside of the bankruptcy process.

A Person Who Dies - a person’s will be usually dictates the heirs to the property. The issue becomes complicated when there is more than one heir since all heirs have to agree to relinquish their interest in the property. If a person dies intestate, the Washington State has laws on succession. If there is a probate, and the probate is in Washington State, then the title company can assist. If the probate is in another state (non-resident of Washington decedent owns property in Washington) then a Washington ancillary probate is opened to establish jurisdiction in this state.

Divorce is another common disruption – which might require the lifting of a restraining order to sell the property and may require a quit claim deed from the parties. However, sometimes a marital property will only have one person’s name on the deed. This may be because of the original financing requirements, an inheritance, or a past effort to protect assets.

Chapter # 12 Errors and Omissions Claims

Errors and Omissions Insurance Overview

Errors and Omissions Insurance, often referred in the real estate industry and E & O Insurance protects the licensee and the brokerage from just that – Errors and Omissions. Most states do not require real estate brokerages to carry this insurance. However, many brokerages choose to purchase this coverage. This is a sound brokerage policy and is especially important should a large claim arise.

It's important to understand that this insurance does not cover intentional misrepresentation or illegal acts whereby the licensee had knowledge of the wrong doing. Like most insurance policies, there are usually exceptions to the coverage.

These details and terms of the coverage may include the following:

Limits of liability for each claim

Limits of liability for each annual period (referred to as an aggregate limit)

Extended reporting period

Deductibles

Annual premiums

Exclusions to the coverage

Annual premium

Types of property to be insured (such as residential, commercial, property management, business opportunities or vacant land)

Personal injury

Subrogation

Lock box property damage

Fair housing coverage

Pollution coverage (which may include mold, fungi asbestos, radon, lead etc.)

Bankruptcy or insolvency of the insured

Assignment of the policy

Arbitration

Terms of cancellation of the policy

Conformance to state statutes

Two Types of Coverage: Inside the Limit of Liability and Outside the Limit of Liability

Inside the Limit of Liability Coverage – this coverage includes attorney fees and court costs within the limit of liability. Let's look at an example:

The limit of liability for the errors and omissions insurance for XYZ Realty is $1,000,000. It is an inside the limit of liability policy. XYZ Realty had a claim for $800,000. The attorney fees and court costs associated with this claim were $300,000.

The claim and the legal fees totaled $1,100,000. XYZ's limit was $1,000,000. In this scenario, XYZ would have to pay the additional $100,000. out of pocket.

Outside the Limit of Liability Coverage – this coverage does not include attorney fees and court cost within the limit of liability. Let's look at an example:

ABC Realty has a limit of liability for errors and omissions insurance of $1,000,000. It is an outside of the limit of liability policy. ABC had a claim for $800,000. The attorney fees and court costs associated with this claim were $300,000. The claim and the legal fees totaled $1,100,000. The $800,000 was within the limit of liability and was coverage by the policy. The $300,000 in legal fees were also completely covered because this policy was an outside of the limit of liability policy.

It goes without saying, that errors and omissions insurance providers will charge a higher premium for an outside of the limit of liability policy.

In addition, there may be further restrictions and specific procedures should a licensee also be the principal (owner or part owner) of the property. Some insurers charge extra for this coverage and some will not cover the licensee as an owner.

Each licensee should know the exactly what type of E & O coverage that their brokerage carries. Here's what to ask:

Does the brokerage have E & O coverage?

Do the licensees pay the brokerage for this coverage (per transaction or per year)?

What is the deductible?

What is the limit of coverage per transaction?

What is the aggregate limit for coverage for the year or policy period?

If I sell my own property, am I insured by E & O Insurance? If so, are there any special procedures that I must follow be insured?

Chapter # 13 Home Warranty Insurance

According to the statistics kept by the E & O Insurance providers, 60% - 70% of the real estate lawsuits involve disclosure issues or the lack thereof. This issue is so important that this is why we devoted chapter 4, in its entirety, to seller's disclosures. Many of these issues can be resolved if there is a home warranty insurance policy in place. These polices cover many minor repairs which could become disclosure Issues.

Home Warranty Insurance, depending on the coverage, could insurance such items as:

Appliances (stoves, refrigerators, dish washers, water heaters, trash compactors)

Systems in the home (heating systems, electrical systems, plumbing systems)

Various structural issues (framing members, fences and outbuildings)

The warranty could also cover the entire house in the case of new construction.

The following are some benefits for the home purchaser:

- Coverage for unexpected home repairs or replacement costs
- Budget/cash flow protection on unexpected repairs
- Coverage regardless of the age, make or model of the appliance
- If it can't be fixed, it could be replaced (depending on the terms and conditions of the policy
- Most insurers provide 24-hour service.

Some of the benefits to the seller are:

- Offering a home warranty can give the seller a competitive edge over other homes in the marketplace not offering a home warranty
- Value added incentive to attract purchasers
- Purchasers may tend to have more confidence in your home if there is a home warranty provided
- If something malfunctions after the sale, there is less liability for the seller (and the broker as well)
- Statistically, in most geographic areas, homes listed with a home warranty sell faster and closer to the asking price.

The typical Home Warranty Insurance on a resale property has an annual premium of $250 - $400.

Example #1

Marty buys a home and purchases a home warranty. Three months after moving in, the hot water heater breaks. The hot water heater was included in the list of covered appliances. Marty received a new hot water heater from the insurer.

Example #2

Mary buys a home and purchases a home warranty. The bathroom faucet breaks. The cost of the faucet and installation is $90. The deductible on Mary's home warranty policy is $150. So, Mary pays for the faucet herself since the deductible was greater than the cost.

The importance of this coverage cannot be overstated, especially in relationship to the number of lawsuits that are created by disclosure issues. Most policies are for one year in duration and are relatively inexpensive (most running $ 250-$400 per year). Usually these policies can be purchased by the seller, the buyer, their broker or almost anyone.

Chapter # 14 Recordkeeping and the Handling of Trust Accounts

Introduction

When a buyer extends an offer to purchase a property, the buyer will make a good faith deposit, called an earnest money deposit, in order to show that they are serious about the purchase of the home and that their offer is bone fide. The amount can vary based on the value of the property, the amount of down payment and the buyer's share of the closing costs. Also, some buyers will make larger earnest money deposits in order to make their offer more attractive and desirable to the seller.

After the offer is accepted, the earnest money deposit becomes part of the contract and is deposited into an account at the escrow company or into the selling broker's trust account. If the buyer defaults on any portion of the Purchase and Sale Agreement, the buyer will normally forfeit the deposit to pay for any damages incurred by the seller, such as having the property off the market and the fact that the seller might have had other potential buyers that are now no longer available.

Importance of the Proper Handling of Earnest Money

Both the listing broker and the selling broker are required to adhere to strict policies and procedures surrounding the handling of such funds. Violations and mishandling of these funds may result in civil suits, criminal proceedings and disciplinary action by the

Washington State Department of Licensing, which could result in possible monetary fine and/or suspension or revocation of the broker's real estate license.

Let's look at some examples of earnest money being handled improperly and the adverse detrimental impact that it could have on a seller or purchaser in a real estate transaction:

The buyer's broker does not collect the earnest money or does not collect the full amount:

In this scenario, the seller may not have all or any compensation should the purchaser default. The purchaser may be in default if the Purchase and Sale Agreement contract stated that a given amount was to be delivered to a trust account by a certain date. These detriments will also hold true for all of the next examples.

Not delivering the earnest money:

This may be a situation where the agent collected the funds but did not deposit them into the trust account agreed to in the trust account that was agreed upon in the contract. When a broker "holds" an earnest money in the file, the chances of the check becoming lost or stolen increase exponentially.

Not delivery the earnest money in a timely manner:

In an extreme case in this example is that the earnest money check may not have cleared the bank prior to the transaction closing. This could delay the closing of the transaction. Any delay in the closing of a transaction can be costly for both the purchaser and the seller.

Not communicating the status of the earnest money to the seller's broker or to the seller-

A broker has the duty by Washington State Law to properly handle all earnest monies. Many sellers might assume that the earnest money had been collected and deposited as specified in the contract. Care should be taken by the buyer's broker to collect and deposit the monies as agreed upon, have proper documentation to prove that the earnest

money was deposited in a timely manner and communicate this status to the seller's broker. The seller's broker should require copies of this documentation as proof of the status of the earnest money.

18.85.361
Disciplinary action — Grounds.

In addition to the unprofessional conduct described in RCW 18.235.130, the director may take disciplinary action against any person engaged in the business or acting in the capacity of a real estate broker, managing broker, designated broker, or real estate firm, regardless of whether the transaction was for the person's own account or in a capacity as broker, managing broker, designated broker, or real estate firm, and may impose any of the sanctions and fines specified in RCW 18.235.110 for any holder or applicant who is guilty of:

(1) Violating any of the provisions of this chapter or any lawful rules made by the director pursuant thereto or violating a provision of chapter 64.36, 19.105, or 18.235 RCW or RCW 18.86.030 or the rules adopted under those chapters or section;

(2) Making, printing, publishing, distributing, or causing, authorizing, or knowingly permitting the making, printing, publication or distribution of false statements, descriptions or promises of such character as to reasonably induce any person to act thereon, if the statements, descriptions, or promises purport to be made or to be performed by either the licensee or his or her principal and the licensee then knew or, by the exercise of reasonable care and inquiry, could have known, of the falsity of the statements, descriptions or promises;

(3) Knowingly committing, or being a party to, any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme, or device whereby any other person lawfully relies upon the word, representation or conduct of the licensee;

(4) Accepting the services of, or continuing in a representative capacity, any broker or managing broker who has not been granted a license, or after his or her license has been revoked or during a suspension thereof;

(5) Conversion of any money, contract, deed, note, mortgage, or abstract or other evidence of title, to the person's own use or to the use of that person's principal or of any other person, when delivered in trust or on condition, in violation of the trust or before the happening of the condition; and failure to return any money or contract, deed, note, mortgage, abstract, or other evidence of title within thirty days after the owner thereof is entitled thereto, and makes demand therefor, is prima facie evidence of such conversion;

(6) Failing, upon demand, to disclose any information within the person's knowledge, or to produce any document, book, or record in the person's possession for inspection by the director or the director's authorized representatives acting by authority of law;

(7) Continuing to sell any real estate, or operating according to a plan of selling, whereby the interests of the public are endangered, after the director has, by order in writing, stated objections thereto;

(8) Advertising in any manner without including the real estate firm's name or assumed name as licensed in a clear and conspicuous manner in the advertisement; except, that real estate brokers, managing brokers, or firms advertising their personally owned real property must only disclose that they hold a real estate license;

(9) Accepting other than cash or its equivalent as earnest money unless that fact is communicated to the owner before the owner's acceptance of the offer to purchase, and such fact is shown in the purchase and sale agreement;

(10) Charging or accepting compensation from more than one party in any one transaction without first making full disclosure in writing of all the facts to all the parties interested in the transaction;

(11) Accepting, taking, or charging any undisclosed commission, rebate, or direct profit on expenditures made for the principal;

(12) Accepting employment or compensation for appraisal of real property contingent upon reporting a predetermined value;

(13) Issuing a report on any real property in which the broker, managing broker, or real estate firm has an interest unless that interest is clearly stated in the report;

(14) Misrepresentation of membership in any state or national real estate association;

(15) Discrimination against any person in hiring or in real estate brokerage service activity, on the basis of any of the provisions of any local, county, state, or federal antidiscrimination law;

(16) Failing to keep an escrow or trustee account of funds deposited relating to a real estate transaction, for a period of three years, showing to whom paid, and other pertinent information as the director may require, such records to be available to the director, or the director's representatives, on demand, or upon written notice given to the bank;

(17) In the case of a firm and its designated broker, failing to preserve records relating to any real estate transaction for three years following the submission of the records to the firm;

(18) Failing to furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories thereof within a reasonable time following execution;

(19) In the case of a broker or managing broker, acceptance of a commission or any valuable consideration for the performance of any acts specified in this chapter, from any person, except the licensed real estate firm with whom the broker or managing broker is licensed;

(20) To direct any transaction involving his or her principal, to any lending institution for financing or to any escrow company, in expectation of receiving a kickback or rebate therefrom, without first disclosing the expectation to his or her principal;

(21) Buying, selling, or leasing directly, or through a third party, any interest in real property without disclosing in writing that the person is a real estate licensee;

(22) In the case of real estate firms, and managing and designated brokers, failing to exercise adequate supervision over the activities of their brokers and managing brokers within the scope of this chapter;

(23) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty,

untrustworthiness, or incompetence;

(24) Acting as a vehicle dealer, as defined in RCW 46.70.011, without having a license to do so; or

(25) Failing to ensure that the title is transferred under chapter 46.12 RCW when engaging in a transaction involving a mobile or manufactured home as a broker, managing or designated broker, or firm

WASHINGTON STATE GUIDELINES FOR INTERNET ADVERTISING AND SOCIAL MEDIA ON THE INTERNET
ADOPTED: March 20, 2013

I. Introduction

A. Why are we doing this?

· As with all real estate advertising, the firm's name or assumed name, as licensed, must be prominently displayed. These guidelines are to assist real estate firms and licensees in complying with the law.
· Provide standards for online practice by licensees and licensed firms that will enhance online real estate consumer protection.
· Provide a framework for licensed entities to create their own Internet Policies and Procedures that addresses and enforces appropriate online licensee practice in compliance with the law.
B. Who is our primary audience?
· Washington Real Estate Firms
· Washington Real Estate Licensees
· Washington Real Estate Consumers
· Website design and/or service providers

II. Disclosure
Licensed entities can use the internet in multiple ways to contact consumers about real estate services and to advertise properties or their services. More ways to use the internet are likely to be invented. "Licensee" and "Licensed Firm" disclosure will help to ensure that online consumers know when they are dealing with a licensed entity, who they are, and where their primary business office is located.

A. "Licensed Firm Disclosure" should contain the following information:
· The firm's name or assumed name(s) as licensed or registered with Washington State Department of Licensing.
B. "Licensee Disclosure" should contain the following information:
· the licensee's name as shown on their license as issued by the Washington State Department of Licensing, Real Estate Program.
· the registered firm name or assumed name of the firm in which the licensee is affiliated as registered with Washington State Department of Licensing, Real Estate Program.
"Full Disclosure" refers to both "licensed firm disclosure" and "licensee disclosure".

C. Guidelines for on-line disclosure
All Internet related advertising that consumers can view or experience, as a separate unit, (for example, email messages or Web pages) should require full disclosure. The burden of proof of such full disclosures falls on the licensee, the firm, and designated broker (licensed entities) when addressing a consumer complaint. This disclosure does not apply once an agency relationship has been established with a buyer or seller. Examples of online communications are listed below:

· The Web

Whenever a licensed entity owns a website or controls its content, every viewable page should include full disclosure. (A "viewable page" is one that may or may not scroll beyond the borders of the screen and includes the use of framed pages.) If you give permission for a 3rd party to advertise your listings maintain regular and thorough oversight to ensure the information is correct. Adhere to copyright laws.

· Email, Newsgroups, Discussion Lists, Bulletin Boards

Such formats should include a full disclosure at the beginning or end of each message. This would not apply to communications between a licensee and a member of the public provided that the member of the public has sent a communication to the licensee and the licensee's initial communication contained the disclosure information required above.

· Instant Messages

Full disclosure is not necessary in this format if the licensed entity provided the written full disclosure via another format or medium (e.g., e-mail or letter) prior to providing, or offering to provide licensable services.

· Chat

Full disclosure prior to providing or offering to provide licensable services during the chat session or in text visible on the same webpage that contains the chat session.

· Social Media

Full disclosure should be prominently displayed and easily understood and be no more than one click away from the viewable page. Each real estate firm should have and maintain a written policy regarding their licensee’s use of social media.
· Multimedia Advertising (e.g. Web based, executable e-mail attachments, etc.)

Full disclosure should be visible as part of the advertising message.

· Banner Ads
Should link to a webpage that has full disclosure that is a single click away from the viewable page unless the banner ad has such full disclosure.

III. Procuring Prospects "On-line"

The Internet poses additional potential problem areas that may require caution on the part of licensees when procuring prospects.

A. Licensees who maintain individual Web sites should ensure that when listings have expired, the listings are removed from Web sites in a timely manner. A possible solution to this problem might be to design a web site program to automatically remove a listing at expiration.

B. Similarly, sites maintained by the multiple listing services of which the licensee is a member should be updated in a timely manner.

C. Licensees, who submit information to third party sites, should provide written communication of any change of listing status to the publisher in a timely manner.

D. Do not give the impression that you are licensed, or are providing services, in jurisdictions where you are not licensed.

E. Licensed entities should not advertise other licensed entities' listings without the written permission and if given, should not alter the online display or any informational part of the listing without written permission of the Designated Broker or listing broker.

F. Metatags are descriptive words hidden in a Web site's HTML code that search engines use to index the Web site. Most sites use common words such as real estate, Washington, city names, homes, houses, etc. Those uses are fine. But some Web site owners have also inserted their competitor's names into the metatags, so that when a potential customer searches for their site, the competitor's site will also come up as a match. This should not be done. Courts have ruled that this constitutes trademark infringement.

G. All licensees shall periodically review the advertising and marketing information on their web site and update as necessary to assure that the information is current and not misleading.

IV. Disclaimers

These guidelines are subject to change at any time and as practice on the Internet evolves additional guidelines may be added.

Licensees should be aware that all statutes and rules respecting advertising apply equally to the Internet. This would include web sites, e-mail, and any other potential "on-line" identification, representation, promotion, or solicitation to the public that is related to licensed real estate activity.

Licensees advertising on the Internet should seek legal advice regarding compliance with local, state and national regulations. Compliance with Washington State guidelines does not ensure compliance with other jurisdiction guidelines, laws or regulations.

Chapter # 15 Rules and Laws Pertaining to the Preparation of Contract Forms

After completion of this chapter, the student should be able to:

Explain or discuss the typical contingency clauses that would be used in a residential Purchase and Sale Agreement. Be able to explain these contingencies to a client.

Identify the necessary components that will make the agreement an enforceable contract

Explain possible problems areas, such as modifying a contact after mutual acceptance, canceling a contract and other law issues

Discuss the necessity of obtaining and using a correct legal description in a Purchase and sale Agreement.

Explain when a street address is not sufficient

Explain the legitimacy of facsimile versus e-mail or original copies

Describe the importance of the Statute of Frauds regarding real estate contracts

Explain the terms “contingency” and “subject to” and explain how they are used in a Purchase and Sale Agreement

Define the term “enforceable” and explain what conditions are necessary for a Purchase and Sale Agreement to be enforceable.

- Explain a seller disclosure statement
- Describe the new 2007 Washington State Legislative changes in the Sellers Disclosures for Residential and Vacant Land Transactions
- Understand what types of properties are required to make this disclosure
- Understand exceptions and exemptions from the new law

Introduction

Forms are an essential part of the transfer of real estate. It is important that you, as the real estate professional are familiar with these forms, know how to use them and have the ability to explain the terms contained within these forms to your clients.

These forms aid in the development of a legally binding contract between the parties and express the terms, conditions, timeline and promises of the seller and the purchaser

Should an issue or dispute ever arise between the parties to a contract, these forms and their content will be of the utmost importance in arbitration or in a court of law.

This chapter focuses on the standard forms used for buyers in a transaction.

Typical Contingency Clauses in Purchase and Sale Agreements

A contingency is a provision in a real estate contract that specifies the contract would cease to exist upon the occurrence or non-occurrence of a certain event. A contingency should be clearly written, concise and have a definite time limit. As a real estate professional, it will be your duty toward your client to watch these time lines very carefully and act within their limits. Many of the contingency forms essentially state that silence construes acceptance, meaning that if don't respond within the time period specified, then you have waived the contingency.

A contract could be contingent on many items but some of the most commonly used in residential real estate are:

Inspection Addendum
Financing Addendum
Optional Clauses Addendum
Homeowner Insurance Addendum
An addendum which would address what personal property was included in the sale.
Possession Addendum (if not at the time of closing)
Seller's Representation addendum

A contingency in a contract could be almost anything (provided that it has a legal purpose).

Example #1

This offer is contingent upon the buyer's getting approval from their Aunt Sue Smith within 24 hours of mutual acceptance.

Example #2 on a Short Sale

The acceptance of this contract by the seller is contingent upon obtaining all underlying lien holder approval.

Inspection Addendum

An inspection addendum usually covers an inspection of the property and deals with structural issues, some pest infestations, underground residential heating oil tanks and on-site sewage disposal systems.

Insert Inspection Addendum to Purchase and Sale Agreement Form 35 (2 Pages)

As a result of this inspection, the buyer can approve of the inspection, terminate the transaction, request additional inspections or ask the seller to perform repairs or modifications. The seller may agree to perform the requests repairs/modifications or refuse. The buyer retains the right to proceed or terminate the contract. The form for responding is shown below NWMLS Form 35R

Insert Inspection Response Form 35R (one page)

Financing Addendum

When an offer is contingent upon the buyer obtaining financing NWMLS Form 22A can be used for example. This form specifies:

Type of loan that the buyer will acquire
Percentage of down payment
Time frame to make application if they have not already done so
Time frame for a loan commitment
Consequence of an appraisal being less than the sale price
Closing costs that the seller will pay for the buyer
Homeowner insurance contingency

TIP: Consider using this form even if your buyer is paying cash or the offer is not contingent upon financing for the following reasons: In the event that your clients decide to have an independent appraisal performed, the appraisal paragraph will allow the buyer to terminate the deal if the appraisal is less than the sale price. Most importantly however, is paragraph # 10 (See Form 22A below) **NOTICE TO BUYER CONCERNING INSURANCE.** This paragraph is, in effect, an insurance contingency and will allow the buyer to terminate the contract if they are unable to obtain home owner's (hazard) insurance. Another option for assuring that your buyer will have an insurance contingency is to use NWMLS Form 22 VV which is shown later in this section

Insert Financing Addendum Form 22A (two pages)

Optional Clauses Addendum

An optional clause addendum addresses such items as:

Square footage, lot size and encroachments
Title insurance
Grounds maintenance
Item left by the seller
Utilities
Insulation for new construction
Leased property
Homeowner's association review board
Other

TIP: Paragraph # 10 (See NWMLS form #22D Optional Clauses Addendum below) is a convenient place to list items which will be included or excluded in the sale. Another important item that might be placed in this paragraph would address e-mail transmission. On NWMLS form 21 PSA, paragraph # m, it states that "e-mail transmission of any document or notice shall not be effective unless the parties to this Agreement otherwise agree in writing." This might be a great place to have all parties agree to e-mail transmission, in writing, if that is the preferred method of transmission by your clients.

Insert Optional Clauses Addendum Form 22D (Two Pages)

Feasibility Contingency Addendum

A feasibility addendum will often accompany an offer to purchase vacant land or commercial property. The buyer will be given a certain amount of days to perform an independent study of the property which might include:

Building or development moratoria
Flood Zones
Wetlands and shorelands
Roads
Water
Sewer
Other utilities
Capacity Charges
Assessments

Insert Feasibility Contingency Addendum Form 35F (one page)

Homeowner (Hazard) Insurance Addendum

Homeowner's (hazard) insurance is important for almost all residential properties. Not only is it good risk management for the homeowner, but most lenders require it as a means of reducing their own risk.

There can be times when a buyer may be refused insurance on a particular property. This may be due to an unsatisfactory CLUE report. CLUE is an acronym for Comprehensive Loss Underwriting Exchange. It is a compilation of all insurance claims. The CLUE may be a report on a particular person or on a property.

Incorporating an insurance contingency into a PSA can protect your buyer. This can be done through such forms as we saw with NWMLS Form 22A, paragraph # 10 or on an addendum specifically designed solely for this purpose (See NWMLS Form 22 VV below)

Insert Homeowner Insurance Addendum Form 22 VV (one page)

An addendum which would address what personal property or fixtures were included in the sale.

All personal property and trade fixtures which are included in the sale should be clearly specified in the purchase and sale agreement. There are a number of ways to do this:

Some appliances are addressed on NWMLS Form 21, paragraph #5
Use of a separate addendum can be used
NWMLS form 22D paragraph #10 (Other) has space to itemize personal property

Possession Addendum (if not at the time of closing)

In many circumstances, the date of possession is not the closing date. Usually this is because the seller will need to close their current home and receive the net proceeds from this home before they can purchase their next home. Even in an ideal situation where both homes close concurrently, the homeowner will need time to move to the next home. There are also circumstances where the seller will need extra time to move for various other reasons.

An addendum should be drawn up and attach to the PSA which addresses all of the following:

Length of the passion period by the seller
Which party will insure the home during the "possession" period (this is usually the buyer through their homeowner's insurance)
What charge, if any will be paid by the seller for this "possession" time

TIP Insurance liability is important. All parties should make sure that the property is insured during this time.

Another situation may arise where a buyer may want to take possession prior to closing, especially on a vacant home. This situation should be avoided if at all possible for the following reasons:

There's always a chance that a buyer may move into a property, discover some unknown undesirable fact, and not want to proceed with the transaction

The insurance liability is extremely high. Example: should one of the buyer's movers injure themselves, the seller may have to bear the liability.

Should the transaction fail to close, the buyer already has possession of the property. Should the buyer refuse to leave, the seller may be forced to proceed with an eviction process.

TIP Before writing an addendum for early possession consult with your manger first. There is also risk of liability for you as a licensee and for your brokerage

Seller's Representation Addendum

A seller's property disclosure statement is usually the form used by the sellers to relate any information and disclosures about the property to the buyer. An example would be NWMLS Form 17. Any material fact or defect must be disclosed to the potential buyers.

The Essential Elements of a Valid Contract

For a legal contract to be binding, the following elements must exist:

1. **Mutual agreement:** Each and every party involved in the contract must agree to and accept the contract and its components. All parties must recognize and acknowledge that an agreement has been made and duly accepted.

2. **Consideration:** A contract must be mutually beneficial, and all parties must recognize and accept the benefits from the contract. These benefits can include money, transfer of ownership, transfer of rights, exchange of services, or anything of value.
3. **Legally competent parties:** In the United States, a person or entity (such as a business, trust or corporation) must be competent and at least 18 years old to enter into a contract. If the party is a business, the person representing the business must also be legally competent and have the authority to act for the business.
4. **Lawful Objective:** A legal contract cannot require any party to knowingly break the law. If so, the contract is usually void.
5. **Written Contract:** The Statute of Frauds is a Washington State law which requires that all real estate contracts be in writing.

Usually an addendum written after mutual acceptance and added to a contract will supersede any conflicting language with the contract.

The Main Types of Contracts Most Used in Used by Residential Sales Transactions

Purchase and Sale Agreement (PSA) - See section one for viewing the form

A Purchase and Sale Agreement is used when a buyer (the offeror) intends to make an offer to the seller (the offeree). Since the Statute of Frauds in Washington State requires all real estate offers to be in writing, the PSA is used for this purpose. Included in the PSA are all of the terms and conditions of the purchase and the time frames in which certain actions must be performed. The PSA will typically specify the following:

Purchase Price
Closing Date
Date of the contract
The multiple listing number if it has one
The full names of all the purchasers
The common address and county where the property is located
A legal description
Included items, such as appliances, wood stoves, security systems
Earnest money and default
Information about disclosures
Contingencies
Information about the title company
Information about the closing or escrow agent
Closing date and date of possession
Offer expiration date
Service of closing agent for payment of utilities
Charges and assessments due after closing
Agency disclosure
What addenda are attached to the contract
Buyer's address, phone, fax and e-mail address and signature
Seller's address, phone, fax and e-mail address and signature

Please take note from the above list that the legal description is in bold type. Without a legal description a PSA is voidable.

The type of Purchase and Sale Agreement (PSA) that will be used will depend on the property. The various types most commonly used by residential agents are:

PSA for Single Family Homes

PSA for Multi-Family Homes

PSA for Vacant Land (Unimproved property)

PSA for Condominiums

The PSA is usually completed by the broker working with the buyers, then signed by the buyers and presented to the sellers

Listing Agreements

When a licensee lists a property for sale, a listing agreement acts as a contract between the seller and the licensee (in actuality between the seller the brokerage). It is like an employment contract in some ways, but it is between a seller and an independent contractor (the licensee). The listing agreement will normally specify the following items:

The common address for the property

The legal description

The length of time of the listing

The licensee and the brokerage company

The rate of commission

What will happen in the event that the seller sells the property.

Authorization to install a key box

Seller's warranties and representations regard the right to sell and encroachments

Seller's indemnification to hold agent harmless if his/her representations are incorrect

Brief information on closing costs

Permission from the seller to be listed in NWMLS and that their agent can cooperate with another member of the MLS

Disclaimer regarding insurance

Broker's right to market the property

Brief information on the seller's disclosure statement

Consequence and damages in the event of a buyer's breach

Attorney's fees

From the above list, please note that the legal description is in bold type. It is one of the most important components of the listing. Without the legal description, the listing agreement is voidable. This means that either party can cancel the contract. Please make note that the legal description of the property, which can be obtained from the last deed and supplied by the title company, is not the same as the street address.

There are two distinct types of listing agreements: Exclusive Sale and Listing Agreement and Exclusive Agency Sale and Listing Agreement. Let's take a closer look at each:

Exclusive Sale and Listing Agreement – allows the broker to earn the listing portion of the commission, no matter who sells the property. Shown below.

Please refer to the chapter on listing agreements to view a listing form

Exclusive Agency Sale and Listing Agreement – the broker does not earn the listing portion of the commission if the seller produces a sale.

Please note that while a licensee may take the listing, that licensee is an agent for the broker and the broker or brokerage owns the listing.

Conditional Release of Listing

The Conditional Release of Listing is another common contract that residential brokers use. In essence, it rescinds the listing agreement with the condition that the seller will still pay the broker a commission if a future buyer purchases the property and has identified the property through the means of the brokers advertising or showing within six months.

Please refer the chapter on listings to view this form.

Buyer's agreement

Commonly used by residential brokers is the Buyer's Agreement. There are two types: Buyer's Agency Agreement and Buyer's Agreement No Agency:

Buyer's Agency Agreement- states that a licensee represents the buyer and that the buyer has an obligation to that licensee for commission during term of the agreement. This agreement is unilaterally cancelable by

either party and must be done in writing. If two brokers are ever in a dispute over commission, a buyer agency agreement can be the proof that a licensee would be entitled to earn a commission.

Please refer to the chapter on agency to view this form.

Buyer's Agreement No Agency - this contract states the licensee does not represent the buyer, even though they may be performing brokerage services for the buyer.

Problems with modifying a signed contract

A contract is said to be fully acknowledged once it has been signed by both parties (the purchaser and the seller). This constitutes a legally binding contact and is also know as mutual acceptance. Changes to the contact after mutual acceptance can only be made if both the buyer and the seller agree to the changes. Both parties must either sign or initial and date the changes.

When changes are made, it is important to notify and re-copy those parties who may already have a copy of the contract. These parties may include:

The buyer
The seller
The listing broker's transaction file and their brokerage's transaction file
The buyer's broker's transaction file and their brokerage's transaction file
The closing agent (escrow)
The lender

Case Study

Buyer and seller have mutual acceptance on a contract. Buyer realizes that they have plans to be out of town for a wedding during the closing and possession time. Buyer wishes to extend the closing date for one week. Seller, on the other hand, has purchased another home and intends to close the new home concurrently with their existing home. Seller refuses to extend the closing date. The seller has the legal right to do so.

Issues with canceling a contract

As stated earlier, a contract is legally binding. If the buyer or the seller chooses to cancel a contact, they could be found guilty of a breach of contact which is also known as a default. If a buyer defaults, they could lose their earnest money or be sued by the seller for non-performance or damages. This remedy that it available is clearly defined on page one of the Purchase and Sale Agreement. If the seller defaults, there is a possibility that the buyer could sue for damages.

Attaching additional pages and addenda to the contract

There are circumstances that arise where something changes during a transaction. The need for additional paperwork may be desired. Again, it must be remembered, that any additions to the contact after mutual acceptance can only be made if both parties agree. If changes, additions or deletions are made, both parties must initial or sign and date the item or clause that has been changed, added or deleted. It is illegal to make any change to a contract without the agreement and initials of both parties

TIP: If changes to the contract were made after copies of the contract were submitted to the lender and the closing agent, be sure to copy these parties again, incorporating these changes.

Necessity of Obtaining a Legal Description

When taking a listing, it is of extreme importance to obtain a full legal description from the last deed and have it initialed by the seller(s). A street or common address is not sufficient, and the listing agreement could be voidable.

For a Purchase and Sale Agreement the same holds true and the legal description must be initialed by both the buyer and the seller

Importance of Notifications

A notification can consist of:

- An offer
- A counter offer
- A rejection of an offer
- An acceptance of an offer
- A removal of a contingency in the contract
- Addenda to the contact
- Resale or public offering statements
- Home owner's association documents
- Disclosures
- Title reports
- Forms which were agreed to be supplied by the buyer, seller or third parties
- Etc.

All notices must be in writing. At lease one of the buyers must sign a notice given to a seller. At lease one seller must sign a notice given to the buyer. Exceptions to this may be certain notices obtained through third parties and original offers.

Notices delivered to the broker of either party are deemed as notices accepted by their client.

Notices are important because throughout the statewide form for the Purchase and Sale Agreement, many time limits are specified for when notices must be delivered. "Time is of the Essence".

You, as the real estate professional, are responsible for making sure that these time deadlines are met by both parties to the transaction and that of third party providers.

Original Copies and Facsimiles

Presenting Offers and Counter Offers - There are three basic methods that offers, and counter offers are presented: and in person, by fax or by e-mail. It is important to note that permission to fax or e-mail must be stated in the contract and agreed to by al of the parties.

Northwest Multiple Listing Service (NWMLS) has the following verbiage contained within their Purchase and Sale Agreement contract:

"Facsimile and E-mail Transmission. Facsimile transmission of any signed original document, and retransmission of and signed facsimile transmission, shall be the same as delivery of an original. At the request of either party, or the Closing Agent, the parties will confirm facsimile transmitted signatures by signing an original document. E-mail transmission of any document or notice shall not be effective unless the parties to this Agreement otherwise agree in writing."

Please note that additional verbiage is required if the parties wish to transmit via e-mail. A clause, such as the following, might be added to the contract before the parties sign to allow for e-mail transmission:

"E-mail transmission of any signed document and retransmission of any e-mailed document shall be the same as delivery of the original."

So, it is important to make sure that this verbiage is included in the contract if the parties wish to transmit via e-mail or fax.

NOTE:

Always seek legal advice before adding your own verbiage to a contract

Let's look at some advantages of each method:

Presenting Offers and Counter-Offers in Person with Original Copies- presenting offers in person has some major advantages. Firstly, a broker can get a feel for the reaction of the other party to whom they are presenting through the observation of body language. Secondly, a broker will also have the opportunity to provide any clarifications or answer any questions that the other party may have. Thirdly, a broker will have the opportunity to show their enthusiasm and sincerity and communicate the strengths of their clients. Fourthly, a broker will have the advantage of working with clean original documents.

The disadvantage is that all parties (buyer's broker, listing broker and sellers) will have to schedule a common time to meet. With busy schedules, out of town sellers or seller who travel for business, this can be quite challenging. Also, the cost of fuel can be a disadvantage for a meeting, especially if any of the brokers or the sellers must travel a long distance to meet.

Presenting Offers and Counter-Offers Via Facsimile (fax) - presenting offers via fax has some advantages since are in almost every office and in most homes. Transmission is fast, and an offer can be received by the listing broker within minutes.

The disadvantage of fax transmittal is that after a few generation of faxing, the document can be of very poor quality and difficult to read.

Most fax machines can be programmed so that a fax journal is produced after each transmittal. This journal will show the time, the number of pages that have been successfully transmitted and the receiving fax number. It will not serve as proof as to the contents of the transmittal. If your fax machine is not set up for individual journals after each transmittal, look into the possibility of programming it to do so. This journal should be kept with each transmittal in the real estate transaction file.

Presenting Offers and Counter-Offers Via E-mail- presenting offers via e-mail has a major advantage: Each e-mail shows the date and contents of entire transmittal. It does not show, however if the e-mail was received.

Disadvantages of e-mail transmission involve signatures. Until electronic signatures are more commonly used, a contact that has bee e-mailed must first be printed out, then signed and then scanned to allow for the re-transmittal. As with faxes, multiple generations of this type of transmittal may lessen the quality of the document and cause it to be illegible. As discussed earlier, e-mails do not show proof of receipt.

Contingency and Subject to Clauses in a Purchase and Sale Agreement

In Washington State, the terms "contingent" and "subject to" are often used interchangeably in a Purchase and Sale Agreement. The more precise definitions are explained below:

Definition of "Subject To":

"Subject to" can also refer to something that goes along with or "runs with" a property when it is purchased. Examples of this would be a purchase of a property subject to as existing easement or subject to an encroachment. It usually refers to a pre-existing condition.

Definition of Contingency

A contingency or subject to clause in a contact states that an event must occur for the contract to continue. If the event does not happen, then the contact is not continued, and the buyer's earnest money is usually refunded.

Example of a written clause using "Subject To":

"Buyer agrees to purchase this property subject to the existing easement in favor of the property to the north"

Example of a written clause with a contingency:

"This offer is contingent upon Aunt Sue's approval of this contract, within three business days after mutual acceptance of this offer. If purchaser does not give notice to the seller or the seller's agent of approval with three business days after mutual acceptance, then this offer shall become void."

Examples of Common Contingencies Found is a Purchase and Sale Agreement

Structural Inspection Contingency
Financing Contingency
Clear Title contingency
Contingency for Selling an Existing Home
Contingency for Approving of the Home Owner's Association
Contingency for Approval of the Resale Certificate (usually condominiums)
Contingency for Approval of a Public Offering Statement (usually Condominiums)
Attorney Review and Approval Contingency
Feasibility Study Contingency (most commonly used for Vacant Land, Commercial or Industrial purchases)
Zoning Contingency

Elements for a Strong, Well Written Contingency

Time- The contingency must have a time limit. In our example (above) Aunt Sue had three days in which approve of the contract.

Consequences – Consequences of non-performance should be stated. In our example (above) the offer became void it Aunt Sue did not approve.

Clear and Unambiguous – contingencies should be clearly stated, with language that is easily understood, so that each party's intentions are known. This is not the time for advance grammar or wording that is unclear or could easily be misinterpreted.

Concise- in this case, short is more desirable. Longer contingencies have a greater chance of being misinterpreted.

Advantages of Using Contingencies in a Contract

Time- A contingency can give either party time to accomplish the actions needed to investigate certain aspects of the property. In our example (above) the buyers were given three days to get out of the contract if Aunt Sue did not approve.

Third party approvals- Examples of this would be important information that would be needed from third parties, such as a title report, a re-sale certificate or information on a home owner's association

Investigation- A contingency may give either party the opportunity to perform important investigations. Examples of this would be a structural inspection, feasibility study and zoning.

Standardized Forms and Cultum v. Heritage House

A licensee should avoid drafting contracts, contract provisions, or legal documents that could be construed as the product of an unlicensed practice of law. Your job is to assist your clients in completing the standard contract forms. Guide your clients by educating them on each of the clauses in the contract and how they might best draft the agreements. Advise your clients to seek proper legal counsel if the custom agreement drafted.

Use only standard forms in the exercise of your duties. Such forms must be reviewed and approved by real estate attorneys. Use extreme caution in adding anything to these standard forms.

In ***Cultum v.. Heritage House Realtors***, the court ruled that licensees need to take great care in using the standardized forms and must ensure that all additions are in line with the terms and conditions of the contract, or the licensee can be held liable to for damages and losses. According to the ruling:

"[An agent] is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the [agent's] business and that such forms will be used only in connection with real estate transactions actually handled by such [agent] as [an agent] and then without charge for the simple service of completing the form."

NOTE: Many brokerages have polices which strictly prohibit agents from writing in and additional clauses in the contract or using blank addenda without management approval. As a licensee, it is imperative that you understand your brokerage's policies regarding this.

What is a seller disclosure Law?

Washington State requires that sellers provide purchasers with a disclosure statement regarding material facts or material defects about a property (Revised Code of Washington 64.06). This applies to real estate purchases and property transfers. This information is based on the seller's actual knowledge of the property when completing the form. Only the seller of the property can complete the statement. It is important to note that real estate agents or any other third party are prohibited from completing the statement for the sellers.

The disclosure may be completed on a Statewide NWMLS Form 17 for Improved Property or a Statewide NWMLS Form 17C for Unimproved Property (Vacant Land). Any vacant land, which can be zoned for residential use must provide a disclosure form such as a Form 17C.

While the seller is responsible for completing the form, it is important to note that there is liability for the licensee as well. The licensee is responsible for what they know or should have known.

Insert Form 17 (5 Pages)

Some of the items the seller is asked to disclose on the statement are:

- Environmental information, such as soil expansion, erosion or settlement
- Open wells, mine shafts or tunnels and noise from surrounding areas including airports or traffic, plus odors or other issues
- Past or present asbestos, lead-based paint, radon, pesticides, underground storage tanks or fuel/chemical storage
- Sewer waste and water treatment and utilities, whether the property currently receives listed utilities, including water sources and information on drinking water along with the name of the utilities provider
- Building and safety information including structural integrity of the property, a notice for the buyer to verify the condition of the roof, wood infestation, treatment history of the property -- including name of treatment provider --for eliminating wood destroying organisms
- Heating, cooling, plumbing and electrical information, including swimming pools, spas, hot tubs, saunas or other features on the property and whether they have had any problems
- Scorpions, rabid animals, bee swarms, rodents, owls or reptiles that have ever been present on the property
- Information about any work or improvements to the property, permits obtained for that work and other miscellaneous items

RCW 64.06.050 discusses errors, omissions and inaccuracy in disclosure statements with respect to actual knowledge:

(1) The seller of residential real property shall not be liable for any error, inaccuracy, or omission in the real property transfer disclosure statement if the seller had no actual knowledge of the error, inaccuracy, or omission. Unless the seller of residential real property has actual knowledge of an error, inaccuracy, or omission in a real property transfer disclosure statement, the seller shall not be liable for such error, inaccuracy, or omission if the disclosure was based on information provided by public agencies, or by other persons providing information within the scope of their professional license or expertise, including, but not limited to, a report or opinion delivered by a land surveyor, title company, title insurance company, structural inspector, pest inspector, licensed engineer, or contractor.

(2) Any licensed real estate salesperson or broker involved in a residential real property transaction is not liable for any error, inaccuracy, or omission in the real property transfer disclosure statement if the licensee had no actual knowledge of the error, inaccuracy, or omission. Unless the salesperson or broker has actual knowledge of an error, inaccuracy, or omission in a real property transfer disclosure statement, the salesperson or broker shall not be liable for such error, inaccuracy, or omission if the disclosure was based on information provided by public agencies, or by other persons providing information within the scope of their professional license or expertise, including, but not limited to, a report or opinion delivered by a land surveyor, title company, title insurance company, structural inspector, pest inspector, licensed engineer, or contractor.

What types of transactions and transfers does it apply to?

Improved Property Disclosures

As of July 22, 2007, under the new law, sellers of improved property must provide a prospective buyer with a new revision of a Sellers Property Disclosure Statement for improved property (NWMLS Form 17 revision 06/07) for all residential property, including multi-family dwellings up to four units, new construction, condominiums not subject to a public offering statement, certain timeshares and manufactured homes.

Unimproved Vacant Land Disclosures

As of July 22, 2007, under the new law, sellers of unimproved property must provide a prospective buyer with a new revision of a Sellers Property Disclosure Statement for unimproved property (NWMLS Form 17C revision 06/07) if the property is zoned, in whole or in part, for residential use.
It is no longer optional as it was under the old law. If a property is located in a municipality where no zoning exists, then a disclosure statement will be required.

Exemptions under the new law

Foreclosures are no longer exempt under the new law.

Exemptions to providing a seller's disclosure statement are now as follows:

(1) A gift or other transfer to a parent, spouse, or child of a transferor or child of any parent or spouse of a transferor;

(2) A transfer between spouses in connection with a marital dissolution;

(3) A transfer where a buyer had an ownership interest in the property within two years of the date of the transfer including, but not limited to, an ownership interest as a partner in a partnership, a limited partner in a limited partnership, a shareholder in a corporation, a leasehold interest, or transfers to and from a facilitator pursuant to a tax deferred exchange;

(4) A transfer of an interest that is less than fee simple, except that the transfer of a vendee's interest under a real estate contract is subject to the requirements of this chapter; and

(5) A transfer made by the personal representative of the estate of the decedent or by a trustee in bankruptcy.

NOTE: If the seller answers "yes" to any of the questions contained in the environmental section of the form, then the buyer cannot waive their right to receive this form (even if you want to).

Chapter # 16 Cancellations, Rescissions and Termination

How a Contract Can Be Discharged or Terminated

Agreement Between the Parties – in this situation both parties may agree to discharge the contract because of:

Cancellation- when both parties to the contact decide to terminate the agreement

Rescission- when a contract is cancelled and both parties are returned to there original position

Novation- when the contract has been substituted for a new contract

Full Performance - when all of the parties have performed their obligations under a contract then a contract is discharged. This is known as full performance or an executed contract.

Chapter # 17 Washington Residential Landlord Tenant Act and the Manufactured Mobile Home Tenant act

The following are the highlights of RCW 59.20 Manufactured/Mobile Home Landlord-Tenant Act:

Elements of the Residential Landlord Tenant Act

The Residential Landlord-tenant Act in Washington is composed of many statues and codes which deal with the relationship of a landlord and tenant. These laws or provisions, along with the terms of a lease, govern the relationship and agreement between the landlord and the tenant. In most cases the provisions of the Act cannot be waived by the tenant or the landlord.

These laws also impose certain restrictions and provide remedies if one party fails to carry out a duty. The remedies include eviction, a reduction of rent, self-help repairs, the right to sue for money damages, and an award of attorneys' fees to the prevailing party.

Other local codes and ordinances may also be imposed which further regulate this act. Further information on local ordinances is usually available from the city council.

The major provisions of the act are:

Rental Agreements

While not always required to be in writing, it is a safe habit to always have this contract in writing to avoid misunderstandings and should contain all of the terms agreed to by the landlord (lessor) and the tenant (lessee).

Rental agreements for furnished dwellings should contain a detailed inventory of furniture or other personal property, along with a description and condition of each individual item.

Just because something is agreed to in a lease does not necessarily mean it is enforceable by the landlord. Some clauses may be illegal, such as a waiver of rights under the Residential Landlord-Tenant Act.

Rental Precaution

Before renting property, a tenant should inspect the dwelling to be sure it is in acceptable condition. Before moving in, a list should be compiled of all existing defects or damages, with both the landlord and tenant signing and keeping a copy of this list. Any commitments made by the landlord (such as a promise to make perform repairs) should be written directly into the lease.

Rent Increase

If there is a lease for a specified period of time, rent may not be changed during that period. In the case of a periodic tenancy (such as month-to-month rental agreement), the rules, including the rent, may be changed upon 30 days notice. His notice must be in writing. Rent increases cannot be in retaliation for a tenant's assertion of their legal rights. The landlord may charge a late payment fee if the rental agreement provides for the charging of a late fee.

Termination of Tenancy

If a landlord seriously violates his or her obligations under the rental agreement, a tenant may be able to terminate the tenancy without liability.

A landlord must follow very specific procedures to terminate a tenancy. To terminate a periodic tenancy, a landlord must give at least 20 days written notice prior to the end of the month. However, if the tenant violates his or her obligations, for example, by failing to pay the rent, the landlord may terminate the lease through eviction proceedings. When a tenant is being evicted because of a rule excluding children or because of conversion to condominiums, 90 days notice is required.

Requirements for Deposits

A landlord may require a deposit to ensure that the tenant treats the dwelling properly and complies with the terms of the rental agreement. Deposit requirements cannot be discriminatory, nor may a deposit be increased to retaliate against a tenant who asserts their legal rights. A nonrefundable fee cannot be called a "deposit." A refundable damage or security deposit must be distinguished from nonrefundable fees for cleaning or pets.

Maintenance and Repairs

The landlord must provide and maintain the rental property and must comply with the rules of the rental agreement. The landlord (or his/her representative) must be accessible to the tenant and must:

- keep the premises up to code;
- maintain the structural components;
- provide a reasonable program for control of pests;
- provide necessary facilities to supply heat, electricity, and hot and cold water;
- provide reasonably adequate locks
- maintain appliances furnished with the rental unit
- comply with any duties imposed by local laws.

Tenant Obligations

The tenant must:

- pay rent
- keep the premises clean
- not damage or permit damage to the unit;
- properly dispose of garbage
- properly use appliances
- restore the property to its initial condition, except for normal wear and tear at the end of the rental term
- comply with the rental agreement.

If the tenant fails to perform their duties, the landlord may seek to evict the tenant. If a tenant fails to maintain the premises, the landlord may:

- Evict the tenant.
- Make repairs and bill the tenant.
- Sue the tenant for damages or to force compliance with the rental agreement.

Insurance

Unless the rental agreement provides otherwise, the tenant has no obligation to insure the dwelling. However, tenants should consider purchasing renter's insurance on personal property and liability insurance for claims by third parties (such as guests) for personal injuries occurring on the premises, since the landlord's insurance covers only the property itself.

Right of Entry

With tenant consent and notice from the landlord, a landlord has a right of entry to inspect the property, perform repairs, supply necessary or agreed services, or show the property to potential tenants, purchasers. Entry is limited to reasonable times, and two days' notice of intent to enter is required. A landlord may enter the premises without the tenant's consent if an emergency or abandonment occurs, or if the landlord obtains a court order. A landlord may not abuse his or her right of access to the property to harass a tenant.

Eviction

The action by a landlord to remove a tenant from a rental unit is known as an eviction or an "unlawful detainer." Some local housing codes define "just cause" for an eviction and outline procedures that must be followed.

In an eviction based on nonpayment of rent, a tenant may assert any claim for money owed the tenant by the landlord. The tenant's claim (sometimes known as an equitable defense or setoff) must be related to the tenancy, such as the tenant's payment of a gas bill that was the landlord's responsibility under the rental agreement. In eviction actions strict rules and procedures must be observed. Generally, a legal eviction process involves:

- Proper notice. Before evicting a tenant, the landlord must serve the required eviction notices using proper procedures.
- Filing of a lawsuit. If the tenant fails to move out, a lawsuit must be filed to evict the tenant.
- Entitlement to a court hearing. If the tenant disputes the reasons for the eviction, the tenant is entitled to a court hearing.
- Sheriff's involvement. If the tenant loses the court hearing, the sheriff would then be ordered to physically evict a tenant and remove the property in the unit. Only the sheriff, not the landlord, can physically remove a tenant who does not comply with an eviction notice and only after an unlawful detainer lawsuit has been filed.
- Liability for attorneys' fees. In an eviction dispute, the successful party is entitled to recoup costs and attorney fees.

Prohibited Eviction

Landlords are generally prohibited from locking a tenant out of the premises, from taking a tenant's property for nonpayment of rent (except for abandoned property under certain conditions), or from intentionally terminating a tenant's utility service. Various penalties exist for violating these protections.

Retaliatory evictions are also illegal. A landlord may not terminate a tenancy or increase rent or change other terms of the rental agreement to retaliate against a tenant who asserts his or her rights under the Landlord-Tenant Act or reports violations of housing codes or ordinances.

Settlement of Disputes

The landlord and tenant may agree to arbitration, asking a neutral party to settle the dispute. The process is usually quick and inexpensive, with the administrative fee shared equally unless otherwise allocated by the arbitrator. Landlord-tenant problems can also be resolved through informal mediation. In mediation, a third person intervenes between two disputing parties in an effort to reach an agreement, compromise or reconciliation. Intended to settle a dispute quickly and inexpensively, mediation can be requested by either a landlord or tenant and may be available without charge from city or county.

Manufactured/Mobile Home Landlord-Tenant Act RCW 59.20

Definitions

(1) "Abandoned" as it relates to a mobile home, manufactured home, or park model owned by a tenant in a mobile home park, mobile home park cooperative, or mobile home park subdivision or tenancy in a mobile home lot means the tenant has defaulted in rent and by absence and by words or actions reasonably indicates the intention not to continue tenancy;

(2) "Eligible organization" includes local governments, local housing authorities,

nonprofit community or neighborhood-based organizations, federally recognized Indian tribes in the state of Washington, and regional or statewide nonprofit housing assistance organizations;

(3) "Housing authority" or "authority" means any of the public body corporate and politic created in RCW35.82.030;

(4) "Landlord" means the owner of a mobile home park and includes the agents of a landlord;

(5) "Local government" means a town government, city government, code city government, or county government in the state of Washington;

(6) "Manufactured home" means a single-family dwelling built according to the United States department of housing and urban development manufactured home construction and safety standards act, which is a national preemptive building code. A manufactured home also: (a) Includes plumbing, heating, air conditioning, and electrical systems; (b) is built on a permanent chassis; and (c) can be transported in one or more sections with each section at least eight feet wide and forty feet long when transported, or when installed on the site is three hundred twenty square feet or greater;

(7) "Manufactured/mobile home" means either a manufactured home or a mobile home;

(8) "Mobile home" means a factory-built dwelling built prior to June 15, 1976, to standards other than the United States department of housing and urban development code, and acceptable under applicable state codes in effect at the time of construction or introduction of the home into the state. Mobile homes have not been built since the introduction of the United States department of housing and urban development manufactured home construction and safety act;

(9) "Mobile home lot" means a portion of a mobile home park or manufactured housing community designated as the location of one mobile home, manufactured home, or park model and its accessory buildings, and intended for the exclusive use as a primary residence by the occupants of that mobile home, manufactured home, or park model;

(10) "Mobile home park," "manufactured housing community," or "manufactured/mobile home community" means any real property which is rented or held out for rent to others for the placement of two or more mobile homes, manufactured homes, or park models for the primary purpose of production of income, except where such real property is rented or held out for rent for seasonal recreational purpose only and is not intended for year-round occupancy;

(11) "Mobile home park cooperative" or "manufactured housing cooperative" means real property consisting of common areas and two or more lots held out for placement of mobile homes, manufactured homes, or park models in which both the individual lots and the common areas are owned by an association of shareholders which leases or otherwise extends the right to occupy individual lots to its own

members;

(12) "Mobile home park subdivision" or "manufactured housing subdivision" means real property, whether it is called a subdivision, condominium, or planned unit development, consisting of common areas and two or more lots held for placement of mobile homes, manufactured homes, or park models in which there is private ownership of the individual lots and common, undivided ownership of the common areas by owners of the individual lots;

(13) "Notice of sale" means a notice required under RCW 59.20.300 to be delivered to all tenants of a manufactured/mobile home community and other specified parties within fourteen days after the date on which any advertisement, multiple listing, or public notice advertises that a manufactured/mobile home community is for sale;

(14) "Park model" means a recreational vehicle intended for permanent or semi-permanent installation and is used as a primary residence;

(15) "Qualified sale of manufactured/mobile home community" means the sale, as defined in RCW82.45.010, of land and improvements comprising a manufactured/mobile home community that is transferred in a single purchase to a qualified tenant organization or to an eligible organization for the purpose of preserving the property as a manufactured/mobile home community;

(16) "Qualified tenant organization" means a formal organization of tenants within a manufactured/mobile home community, with the only requirement for membership consisting of being a tenant;

(17) "Recreational vehicle" means a travel trailer, motor home, truck camper, or camping trailer that is primarily designed and used as temporary living quarters, is either self-propelled or mounted on or drawn by another vehicle, is transient, is not occupied as a primary residence, and is not immobilized or permanently affixed to a mobile home lot;

(18) "Tenant" means any person, except a transient, who rents a mobile home lot;

(19) "Transient" means a person who rents a mobile home lot for a period of less than one month for purposes other than as a primary residence;

(20) "Occupant" means any person, including a live-in care provider, other than a tenant, who occupies a mobile home, manufactured home, or park model and mobile home lot.

Code applies to rental agreements regarding mobile home lots, cooperatives, or subdivisions

This chapter shall regulate and determine legal rights, remedies, and obligations arising from any rental agreement between a landlord and a tenant regarding a mobile home lot and including specified amenities within the mobile home park, mobile home park

cooperative, or mobile home park subdivision, where the tenant has no ownership interest in the property or in the association which owns the property, whose uses are referred to as a part of the rent structure paid by the tenant. All such rental agreements shall be unenforceable to the extent of any conflict with any provision of this chapter. Chapter 59.12 RCW shall be applicable only in implementation of the provisions of this chapter and not as an alternative remedy to this chapter which shall be exclusive where applicable: PROVIDED, That the provision of RCW59.12.090, 59.12.100, and 59.12.170 shall not apply to any rental agreement included under the provisions of this chapter. RCW 59.18.055 and 59.18.370 through 59.18.410 shall be applicable to any action of forcible entry or detainer or unlawful detainer arising from a tenancy under the provisions of this chapter, except when a mobile home, manufactured home, or park model or a tenancy in a mobile home lot is abandoned. Rentals of mobile homes, manufactured homes, or park models themselves are governed by the Residential Landlord-Tenant Act, chapter 59.18 RCW.

Enforceability of rules against a tenant.

Rules are enforceable against a tenant only if:

(1) Their purpose is to promote the convenience, health, safety, or welfare of the residents, protect and preserve the premises from abusive use, or make a fair distribution of services and facilities made available for the tenants generally;

(2) They are reasonably related to the purpose for which they are adopted;

(3) They apply to all tenants in a fair manner;

(4) They are not for the purpose of evading an obligation of the landlord; and

(5) They are not retaliatory or discriminatory in nature.

Written rental agreement for term of one year or more required — Waiver — Exceptions — Application of section.

(1) No landlord may offer a mobile home lot for rent to anyone without offering a written rental agreement for a term of one year or more. No landlord may offer to anyone any rental agreement for a term of one year or more for which the monthly rental is greater, or the terms of payment or other material conditions more burdensome to the tenant, than any month-to-month rental agreement also offered to such tenant or prospective tenant. Anyone who desires to occupy a mobile home lot for other than a term of one year or more may have the option to be on a month-to-month basis but must waive, in writing, the right to such one year or more term: PROVIDED, That annually, at any anniversary date of the tenancy the tenant may require that the landlord provide a written rental agreement for a term of one year. No landlord shall allow a mobile home, manufactured home, or park model to be moved into a mobile home park in this state until a written rental agreement has been signed by and is in the possession of the parties: PROVIDED, That if the landlord allows the tenant to move a mobile home, manufactured home, or park model into a mobile home park without obtaining a written rental agreement for a term of one year or more, or a written waiver of the right to a one-year term or more, the term of the tenancy shall be deemed to be for one year from the date of occupancy of the mobile home lot;

(2) The requirements of subsection (1) of this section shall not apply if:

(a) The mobile home park or part thereof has been acquired or is under imminent threat of condemnation for a public works project, or

(b) An employer-employee relationship exists between a landlord and tenant;

(3) The provisions of this section shall apply to any tenancy upon expiration of the term of any oral or written rental agreement governing such tenancy.

Rental agreements — Required contents — Prohibited provisions.

(1) Any mobile home space tenancy regardless of the term, shall be based upon a written rental agreement, signed by the parties, which shall contain:

(a) The terms for the payment of rent, including time and place, and any additional charges to be paid by the tenant. Additional charges that occur less frequently than monthly shall be itemized in a billing to the tenant;

(b) Reasonable rules for guest parking which shall be clearly stated;

(c) The rules and regulations of the park;

(d) The name and address of the person who is the landlord, and if such person does not reside in the state there shall also be designated by name and address a person who resides in the county where the mobile home park is located who is authorized to act as agent for the purposes of service of notices and process. If no designation is made of a person to act as agent, then the person to whom rental payments are to be made shall be considered the agent;

(e) The name and address of any party who has a secured interest in the mobile home, manufactured home, or park model;

(f) A forwarding address of the tenant or the name and address of a person who would likely know the whereabouts of the tenant in the event of an emergency or an abandonment of the mobile home, manufactured home, or park model;

(g)(i) A covenant by the landlord that, except for acts or events beyond the control of the landlord, the mobile home park will not be converted to a land use that will prevent the space that is the subject of the lease from continuing to be used for its intended use for a period of three years after the beginning of the term of the rental agreement;

(ii) A rental agreement may, in the alternative, contain a statement that: "The park may be sold or otherwise transferred at any time with the result that subsequent owners may close the mobile home park, or that the landlord may close the park at any time after the required notice." The covenant or statement required by this subsection must: (A) Appear in print that is in bold face and is larger than the other text of the rental agreement; (B) be set off by means of a box, blank space, or comparable visual device; and (C) be located directly above the tenant's signature on the rental agreement.

(h) The terms and conditions under which any deposit or portion thereof may be withheld by the landlord upon termination of the rental agreement if any moneys are paid to the landlord by the tenant as a deposit or as security for performance of the tenant's obligations in a rental agreement;

(i) A listing of the utilities, services, and facilities which will be available to the tenant during the tenancy and the nature of the fees, if any, to be charged;

(j) A description of the boundaries of a mobile home space sufficient to inform the tenant of the exact location of the tenant's space in relation to other tenants' spaces;

(k) A statement of the current zoning of the land on which the mobile home park is located; and

(l) A statement of the expiration date of any conditional use, temporary use, or other land use permit subject to a fixed expiration date that is necessary for the continued use of the land as a mobile home park.

(2) Any rental agreement executed between the landlord and tenant shall not contain any provision:

(a) Which allows the landlord to charge a fee for guest parking unless a violation of the rules for guest parking occurs: PROVIDED, That a fee may be charged for guest parking which covers an extended period of time as defined in the rental agreement;

(b) Which authorizes the towing or impounding of a vehicle except upon notice to the owner thereof or the tenant whose guest is the owner of the vehicle;

(c) Which allows the landlord to alter the due date for rent payment or increase the rent: (i) During the term of the rental agreement if the term is less than one year, or (ii) more frequently than annually if the term is for one year or more: PROVIDED, That a rental agreement may include an escalation clause for a pro rata share of any increase in the mobile home park's real property taxes or utility assessments or charges, over the base taxes or utility assessments or charges of the year in which the rental agreement took effect, if the clause also provides for a pro rata reduction in rent or other charges in the event of a reduction in real property taxes or utility assessments or charges, below the base year: PROVIDED FURTHER, That a rental agreement for a term exceeding one year may provide for annual increases in rent in specified amounts or by a formula specified in such agreement;

(d) By which the tenant agrees to waive or forego rights or remedies under this chapter;

(e) Allowing the landlord to charge an "entrance fee" or an "exit fee." However, an entrance fee may be charged as part of a continuing care contract as defined in RCW 70.38.025;

(f) Which allows the landlord to charge a fee for guests: PROVIDED, That a landlord may establish rules charging for guests who remain on the premises for more than fifteen days in any sixty-day period;

(g) By which the tenant agrees to waive or forego homestead rights provided by chapter 6.13 RCW. This subsection shall not prohibit such waiver after a default in rent so long as such waiver is in writing signed by the husband and wife or by an unmarried claimant and in consideration of the landlord's agreement not to terminate the tenancy for a period of time specified in the waiver if the landlord would be otherwise entitled to terminate the tenancy under this chapter; or

(h) By which, at the time the rental agreement is entered into, the landlord and tenant agree to the selection of a particular arbitrator.

Duties of Landlord

It shall be the duty of the landlord to:

(1) Comply with codes, statutes, ordinances, and administrative rules applicable to the mobile home park;

(2) Maintain the common premises and prevent the accumulation of stagnant water and to prevent the detrimental effects of moving water when such condition is not the fault of the tenant;

(3) Keep any shared or common premises reasonably clean, sanitary, and safe from defects to reduce the hazards of fire or accident;

(4) Keep all common premises of the mobile home park, and vacant mobile home lots, not in the possession of tenants, free of weeds or plant growth noxious and detrimental to the health of the tenants and free from potentially injurious or unsightly objects and condition;

(5) Exterminate or make a reasonable effort to exterminate rodents, vermin, or other pests dangerous to the health and safety of the tenant whenever infestation exists on the common premises or whenever infestation occurs in the interior of a mobile home, manufactured home, or park model as a result of infestation existing on the common premises;

(6) Maintain and protect all utilities provided to the mobile home, manufactured home, or park model in good working condition. Maintenance responsibility shall be determined at that point where the normal mobile home, manufactured home, or park model utilities "hook-ups" connect to those provided by the landlord or utility company;

(7) Respect the privacy of the tenants and shall have no right of entry to a mobile home, manufactured home, or park model without the prior written consent of the occupant, except in case of emergency or when the occupant has abandoned the mobile home, manufactured home, or park model. Such consent may be revoked in writing by the occupant at any time. The ownership or management shall have a right of entry upon the land upon which a mobile home, manufactured home, or park model is situated for maintenance of utilities, to insure compliance with applicable codes, statutes, ordinances, administrative rules, and the rental agreement and the rules of the park, and protection of

the mobile home park at any reasonable time or in an emergency, but not in a manner or at a time which would interfere with the occupant's quiet enjoyment. The ownership or management shall make a reasonable effort to notify the tenant of their intention of entry upon the land which a mobile home, manufactured home, or park model is located prior to entry;

(8) Allow tenants freedom of choice in the purchase of goods and services, and not unreasonably restrict access to the mobile home park for such purposes;

(9) Maintain roads within the mobile home park in good condition; and

(10) Notify each tenant within five days after a petition has been filed by the landlord for a change in the zoning of the land where the mobile home park is located and make a description of the change available to the tenant.

A landlord shall not have a duty to repair a defective condition under this section, nor shall any defense or remedy be available to the tenant under this chapter, if the defective condition complained of was caused by the conduct of the tenant, the tenant's family, invitee, or other person acting under the tenant's control, or if a tenant unreasonably fails to allow the landlord access to the property for purposes of repair.

Duties of Tenant

It shall be the duty of the tenant to pay the rental amount at such times and in such amounts as provided for in the rental agreement or as otherwise provided by law and comply with all obligations imposed upon tenants by applicable provisions of all municipal, county, and state codes, statutes, ordinances and regulations, and in addition the tenant shall:

(1) Keep the mobile home lot which he occupies and uses as clean and sanitary as the conditions of the premises permit;

(2) Properly dispose of all rubbish, garbage, and other organic or flammable waste, in a clean and sanitary manner at reasonable and regular intervals, and assume all costs of extermination and fumigation for infestation caused by the tenant on the tenant's leased premises;

(3) Not intentionally or negligently destroy, deface, damage, impair, or remove any facilities, equipment, furniture, furnishings, fixtures or appliances provided by the landlord, or permit any member of his family, invitee, or licensee, or any person acting under his control to do so;

(4) Not permit a nuisance or common waste; and

(5) Not engage in drug-related activities as defined in RCW 59.20.080.

Chapter # 18 Accommodations Under the Americans With Disabilities Act

The Americans with Disability Act (ADA) of 1990 provides nondiscrimination protection for individuals with disabilities in the areas of employment, public services, transportation, access to public facilities and telecommunications. As stated in the Act, its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Most of the ADA provisions took effect in 1992.

Title III of the Americans with Disabilities Act

Title III covers businesses and nonprofit service companies that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, funeral homes, day care centers, and recreation facilities including sports arenas and fitness clubs. Transportation services provided by private entities are also covered by Title III.

Public accommodations must comply with nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment when ever it is reasonable to do so. They also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Also, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources.

Courses and examinations related to professional, educational, or trade-related applications, licensing, certifications, or credentialing must be provided in a place and manner accessible to people with disabilities, or alternative arrangements must be offered.

Commercial facilities, such as factories, must comply with the ADA's architectural standards for new construction.

All new construction and modifications must be accessible to individuals with disabilities. For existing facilities, barriers to services must be removed if readily achievable. Public accommodations include facilities such as restrooms, restaurants, hotels, retail stores, etc., as well as privately owned transportation systems.

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

The ADA requires that no one can be discriminated against because of a disability to accessibility in any place of public accommodation. A public accommodation is a public or private entity which is open to public for commerce. The ADA requires the following to be accomplished, as long as it is "reasonably achievable". Please refer to section I of this chapter on Title III of ADA:

New construction, when not structurally impossible, must be made accessible to people with disabilities

Items that would be a barrier for architectural issues and communication issues must removed so that god and services can be accessed by folks with disabilities

Auxiliary aids and services must be provided so that no one who had a disability is excluded or treated different from other people.

Residential landlords are also subject to the requirements of the Americans with Disabilities Act (ADA) when it comes to renting housing to individuals with disabilities. ADA requirements require the landlord to make "reasonable accommodation". The landlord must allow the tenant (at tenant's expense) to make modifications to the unit to meet his/her individual needs. At the end of the rental period, the tenant must return the unit to the original condition, at the landlord's discretion. Also, a landlord must allow a seeing eye dog in the unit of a visually impaired tenant or person with a service dog. In the case of a single rental unit in an owner's residence, the law permits refusal to make physical changes to the unit.

Example

Bob wishes to rent an apartment in a 20-unit complex. Bob has a service dog. The landlord has a strict policy with no pets allowed. As long a Bob qualifies to pay the rent and had good credit, the landlord is prohibited from discriminating against Bob, according to the ADA and must rent the unit to Bob and his service dog.

Chapter # 19 Tenancy in Common Versus Joint Tenancy

Joint Tenancy

Two or more individuals can be joint tenants. Their ownership must be equal. All owners must agree on the use and disposition of the property.
The key feature of joint tenancy is the right of survivorship. Upon death, the property passes to the survivor(s) without going through probate.
To create a joint tenancy, the four unities of title must exist:

Unity of Interest- each joint tenant has an equal interest in the property

Unity of Title – each joint tenant received the property through the same deed or will

Unity of Time – the deed was executed at a single time

Unity of Possession – each joint tenant is entitled to an undivided possession of the property

Since the title passes directly to other joint tenants upon death the property cannot be willed.

Example

Betty, Hong, Bob and Sue own property as joint tenants. Betty dies. Now Hong, Bob and Sue own the property. Betty's heirs have no claim to the property.

Advantages: Avoid the cost and delay of probate proceedings
Disadvantages: Gives up the right to convey the property by will

Tenancy in Common

In tenancy in common two or more individuals have an undivided interest in a property. Each tenant in common has a right to share possession of the whole property, not just a part it. (Referred to as the unity of possession). Tenants in common may have equal or unequal interests in the property.

Example

Chiaki, Nancy and Joe own a property as tenants in common. Chiaki has a 50% interest, Nancy has a 30% interest and Joe has a 20% interest.

Tenants in common may deed their interest to someone else and don't need the consent of the other tenants and may also mortgage their interest without the consent of the other tenants. Upon death, the individual's interest passes to their designated heir(s).

Termination of a tenancy in common –may be accomplished through legal action called a partition suit. Usually the partition occurs when there is a dispute over the real property. Since property is extremely difficult to divide, usually a court orders one of the co-owners to buy out the others.

Chapter # 20 Ground Leases

Ground Lease

A ground lease is a long term where the owner (lessor) grants occupancy of vacant land to a lessee. What differentiates ground leases from conventional leases is that the lessee normally has the right to construct or upgrade structures on the land. If the lessee does not renew the lease, the rights of the lessee revert to the lessor including all the improvements to the land with no compensation paid to the lessee.

This is not usually a desirable arrangement from the point of view of the lessee. A ground lease is also referred to as a land lease.

Chapter # 21 Condemnation and Eminent Domain

Eminent domain is the power of the state to seize a person's property or seize a citizen's rights in property with due monetary compensation, but without the owner's consent. The property is taken either for government, public or civic use or, in some cases, economic development. The most common uses of property taken by eminent domain are for public utilities and roads. The government body offers to purchase the property from the owner before resorting to the use of eminent domain (the taking of property).

The term "**condemnation**" is used to describe the formal act of the exercise of the power of eminent domain to transfer title to the property from its private owner to the government. This use of the word should not be confused with its sense of a declaration that real property, generally a building, has become so dilapidated as to be legally unfit for human habitation due to its physical defects. This type of condemnation of buildings (on grounds of health and safety hazards or gross zoning violation) usually does not deprive the owners of the title to the property condemned but requires them to rectify the offending situation or have the government do it for the owner at the owner's expense.

Condemnation via eminent domain indicates the government is taking ownership of the property or a lesser interest in it, such as an easement. In most cases the only thing that remains to be decided when a condemnation action is filed is the amount of **just compensation**, although in some cases the right to take may be challenged by the property owner on the grounds such as: if the attempted taking is not for a public use, or has not been authorized by the legislature, or because the condemnation was not completed following proper procedures required by law.

Just compensation is usually the fair market value of the property.

The exercise of eminent domain is not limited to real property. Governments may also condemn personal property, such as supplies for the military in wartime, intangible property such as contracts, patents, copy rights, etc.

Chapter # 22 Appurtenances

Real property includes the land, any fixtures or improvements attached to the land, rights and privileges associated with the land and any appurtenance that is associated with the land. An appurtenance is a right or interest that runs with the land such as:

Air Rights
Water Rights
Mineral Rights
Oil Rights
Gas Rights
Surface rights

The details of these appurtenances are discussed in further detail in the chapter.

Personal Property

Real property consists of everything else that is not real property. The terms chattel, personalty or immovable are also often use to describe personal property. There are legal tests which are used to determine whether an item is real property of personal property. We we'll study these in detail and examine a few case studies on real versus personal property.

Surface and Support Rights

Lateral Support Rights- lateral support is the support from adjacent properties

Subjacent Support Rights- subjacent support is the support from the underlying earth

Land ownership encompasses both of these rights.

Subsurface Rights

In our prior discussion of land, we mentioned that land encompasses the ground beneath the surface. In theory, a landowner owns the ground which reaches to the core of the earth. These subsurface rights might include water rights, and MOG (mineral, oil and gas) rights. A landowner may sell
their MOG rights while still maintaining ownership of their property.

Air Rights

As we state earlier, in theory, a landowner owns the air space above the surface of the land. If this was the case literally, then air traffic would be able to fly over land that was not owned by the public. When congress gave the federal government complete control over the national airspace, it left landowners with the right to use airspaces at the lower reaches as long as it did not interfere with air traffic.

Water Rights

Water rights may consist of water found above the surface or below the surface. Surface waters fall into two categories:

Riparian rights
Appropriative rights

Riparian Rights- refer to water that flows through or adjacent to a property. The landowner, known as a riparian landowner, has a right to have reasonable use of the flow of the stream, creek or river. These uses might include water needed for domestic use such as:

Drinking water
Bathing and cleaning
Irrigation for home gardening

If the waterway is large enough to be used by commerce, then it is considered a navigable waterway. If it is a navigable waterway, the government owns the land under the water and the riparian landowner owns the land to the mean high-water mark of the shore. If the waterway is non-navigable, then the riparian landowner owns the land under the water to the midpoint of the stream bed.

Up stream landowners are not allowed to substantially diminish the flow of the waterway.

Littoral Rights – refer to water beside a lake**.** Littoral landowners are entitled to use the water for recreational purposes, have the lake maintained at its natural level and have the natural water purity of the lake maintained. If the lake in non-navigable, then each littoral owner owns a portion of the lake bed which is adjacent to their property.

Riparian or littoral owners are not allowed to use the water from the lake or flowing waterway for land that is not adjacent to the water.

In Washington State, the riparian and littoral rights system was replaced by the appropriative rights system. All riparian and littoral landowners were required to register their water rights with the Department of Ecology by June 30, 1974.

Appropriate Rights System – has one major difference over the older riparian or littoral water rights system. The older system was tied to land ownership, whereas the appropriative right system is not dependent on land ownership. It is based on a permit system. If someone wants to use the water from a lake or stream, they must make application with the Department of Ecology.

Landowners also have overlying rights to the ground water in aquifers beneath their property.

In conclusion, think of real property as land, attachments and a **bungle of rights** that were discussed in this chapter

Unit D Employment Issues and Employment Law Compliance

Objectives

Upon completion of this section, the student should be able to:

Understand proper interviewing and hiring procedures

Know affirmative action

Understand the required employment forms

Understand employee compensation and benefits

Understand tax compliance

Describe proper recordkeeping

Understand family and medical leave

Understand discipline and termination

Know the main points of the Fair Labor Standards Act (FLSA)

Know the main points of the Occupational Safety and Health Act (OSHA)

Understand the Americans with Disabilities Act (ADA)

Understand the main points of the Employee Retirement Income Security Act (ERISA)

Understand state regulations and the role of the department of Labor and Industries

Understand how the size of a business can affect Laws and Regulations

Define and know the difference between Employees, Independent contractors and temporary workers

Understand the liability for employees' actions and supervisory responsibilities

Understand Unemployment Compensation and Worker's Compensation Insurance

Define

- **Privacy Issues**
- **Mandatory Employees**
- **Business Ethics**
- **Mediation**
- **Arbitration**

Chapter # 1 Proper Interviewing and Hiring Procedures

Introduction

Our society has become litigious in the area of employment-related issues. Every recruiter, hiring manager, executive, and department manager must realize that asking the wrong interview questions or making improper inquiries can lead to discrimination or wrongful-discharge lawsuits, and these suits can be won or lost based on statements made during the interview process.

Thus, it is important to incorporate risk management into the interviewing process to help minimize your firm's exposure to employment practices liability.

You, or your firm, could be accused of asking improper interview questions or making discriminatory statements or comments that reflect bias. It is also possible to make assurances or promises during an interview that can be interpreted as binding contracts. Identifying these potential danger areas is the best way to avoid saying something that is unacceptable during an interview.

Most companies have at least two people responsible for interviewing and hiring applicants. It's critical to have procedures to ensure consistency. Develop interviewing forms containing objective criteria to serve as checklists.

These checklists ensure consistency between interviewers, as well as create documentation to support the decision if a discrimination charge is later filed by an unsuccessful applicant.

Interview Problems to Avoid

To minimize the risk of discrimination lawsuits, it’s important for interviewers to be familiar with topics that aren’t permissible as interview questions. For example, you shouldn’t ask a female applicant detailed questions about her husband, children and family plans.

Such questions can be used as proof of sex discrimination if a male applicant is selected for the position, or if the female is hired and later terminated. Older applicants shouldn’t be asked about their ability to take instructions from younger supervisors.

It is also important to avoid making statements during the interview process that could be alleged to create a contract of employment. When describing the job avoid using terms like "permanent," "career job opportunity," or "long term."

Interviewers should also avoid making excessive assurances about job security. Avoid statements that employment will continue as long as the employee does a good job. For example, suppose that an applicant is told that "if you do a good job, there's no reason why you can't work here for the rest of your career." The applicant accepts the job and six months later is laid off due to personnel cutbacks.

This could lead to a breach of contract claim where the employee asserts that he or she can't be terminated unless it's proven that he or she didn't do a "good job." Courts have, on occasion, held that such promises made during interviews created contracts of employment.

Illegal Interview Questions

Learn to assess job candidates on their merits. When developing evaluation criteria, break down broad, subjective impressions to more objective factors.

Obviously, you must prepare for the interview by reviewing the application, resume, test results, and other materials submitted by the candidate. Attempt to put the candidate at ease and ask interview questions that can't be answered with a "yes" or "no" response.

These open-ended questions allow applicants to tell all about their skills, knowledge and abilities. Some examples are: "Why are you leaving your current employer?" "Do you prefer routine, consistent work, or fast-paced tasks that change daily?" "And why?"

Interview Problems to Avoid

Interview questions and issues, you want to avoid include the following:

Avoid asking improper interview questions, and making discriminatory statements

The following are examples of interview questions that should be avoided in interviews because they may be alleged to show illegal bias.

- Are you a U.S. citizen? (adversely impacts national origin)
- Do you have a visual, speech, or hearing disability?
- Are you planning to have a family? When?
- Have you ever filed a workers' compensation claim?
- How many days of work did you miss last year due to illness?
- What off-the-job activities do you participate in?
- Would you have a problem working with a female/male partner?
- Where did you grow up?
- Do you have children? How old are they?
- What year did you graduate from high school? (reveals age)

As you can see, these rather simple and seemingly non-threatening questions can easily violate one of the aforementioned dangers when conducting interviews.

Now that you know about illegal interview questions, we will next discuss how to develop a legal interview and interview questions.

Successful companies not only train their recruiters, but they train their executives, department managers, and hiring managers on legal and effective interview questions and techniques to utilize during the interview. Many companies will conduct a job analysis audit for every position within their companies to establish the types of behavioral and situational questions necessary for their interviewing process. A job analysis audit is a process whereby a company compiles objective data of what is required to be successful in a given position. This process is conducted via interviews, surveys, and testing (both hard skills and soft skills testing).

This process allows the company to objectively identify the competencies, behaviors, thinking and decision-making styles, as well as the technical skills that are common among their top performers and required for the position in question. This process establishes a hiring “benchmark” or interviewing “guide” to follow.

Insert Interview Summary and Interview Questions (total 6 pages)

The resulting list of critical competencies is what interviewers will use to evaluate candidates. This benchmark, custom to each position, leads the company to define the core line of behavioral interview questions that will uncover these critical competencies, behaviors, and thinking styles, as they directly relate to the job requirements.

Some of the most effective pre-employment behavioral assessments in the market will provide the necessary questions to pose to candidates. This is due to the assessment's objective evaluation of each candidate’s competencies.

Here are a few examples of legally-defensible behavioral interview questions that will assist in uncovering core competencies in an interview.

- What has been particularly demanding goal for you to achieve? (This interview question taps into the candidate's achievement orientation and requires them to explain the obstacle and their thought process and actions to overcoming the obstacle.).
- Can you think of a situation in which an innovative course of action was needed? What did you do in this situation? (This interview question allows you to uncover whether the candidate can develop innovative solutions to work-related problems and identify potential opportunities and ways to capitalize on them.)

- What are the typical customer interactions you have in your present position? Can you think of a recent example of one of these? (This interview question focuses on the candidate's customer service orientation.)

- Have you ever been in a situation where you have had to take on new tasks or roles? Describe this situation and what you did? (This interview question allows you to probe into the candidate's degree of flexibility.)

- In your present position, what standards have you set for doing a good job? How did you determine them? (This interview question allows you to determine if the candidate has high work standards.)

By instituting guidelines such as these and making sure that your organization's managers follow them you will reduce the risk of a lawsuit from an employee or job applicant.

Chapter # 2 Affirmative Action

Introduction

Affirmative action is a set of public policies and initiatives designed to help eliminate past and present discrimination based on race, color, religion, sex, or national origin. We will talk about the history, who and what is affected by these laws. In addition, we shall discuss the meaning and requirements of this law.

Originally, civil rights programs were enacted to help African Americans become full citizens of the United States. The Thirteenth Amendment to the Constitution made slavery illegal; the Fourteenth Amendment guarantees equal protection under the law; the Fifteenth Amendment forbids racial discrimination in access to voting. The 1866 Civil Rights Act guarantees every citizen ”the same right to make and enforce contracts ... as is enjoyed by white citizens”.

In 1941, President Franklin D. Roosevelt signed Executive Order 8802 which outlawed segregationist hiring policies by defense-related industries which held federal contracts. Roosevelt's signing of this order was a direct result of efforts by Black trade union leader, A. Philip Randolph.

During 1953 President Harry S. Truman's Committee on Government Contract Compliance urged the Bureau of Employment Security “to act positively and affirmatively to implement the policy of nondiscrimination”

The 1954 Supreme Court decision in Brown v. Board of Education overturned Plessy v. Ferguson.

The actual phrase “affirmative action” was first used in President John F. Kennedy's 1961 Executive Order 10925 which requires federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." The same language was later used in President Lyndon Johnson's 1965 Executive Order 11246.

In 1967, Johnson expanded the Executive Order to include affirmative action requirements to benefit women.

Other equal protection laws that were passed to make discrimination illegal were the 1964 Civil Rights Act, Title II and VII of which forbid racial discrimination in "public accommodations" and race and sex discrimination in employment, respectively; and the 1965 Voting Rights Act adopted after Congress found "that racial discrimination in voting was an insidious and pervasive evil which had been perpetuated in certain parts of the country through unremitting and ingenious defiance of the Constitution."

Much of the opposition to affirmative action is framed on the grounds of so-called "reverse discrimination and unwarranted preferences." Less than 2 % of the 91,000 employment discrimination cases pending before the Equal Employment Opportunities Commission are reverse discrimination cases. Under the law, as written in Executive Orders and interpreted by the courts, anyone benefiting from affirmative action must have relevant and valid job or educational qualifications.

Acceptable Affirmative Phrases for Discussing Disabilities

Using affirmative language is the first step in communicating well with people with disabilities, according to the Office of Disability Employment Policy (ODEP). Their examples:

Affirmative Phrases	Negative Phrases
person with an intellectual, cognitive, developmental disability	retarded; mentally defective
person who is blind; person who is visually impaired	the blind
person with a disability	the disabled; handicapped

person who is deaf	the deaf; deaf and dumb
person who is hard of hearing	suffers a hearing loss
person who has multiple sclerosis	afflicted by MS
person with epilepsy; person with a seizure disorder	Epileptic
person who uses a wheelchair	confined or restricted to a wheelchair
person with a physical disability; physically disabled	crippled; lame; deformed
unable to speak; uses synthetic speech	dumb; mute
person with psychiatric disability	crazy; nuts
person who is successful, productive	has overcome his/her disability; is courageous (when it implies the person has courage because of having a disability)

ODEP offers the following advice for communicating with people with disabilities:

General Tips

When introduced to a person with a disability, it is appropriate to offer to shake hands. People with limited hand use or who wear an artificial limb can usually shake hands. (Shaking hands with the left hand is an acceptable greeting.)

If you offer assistance, wait until the offer is accepted. Then listen to or ask for instructions.
Relax. Don't be embarrassed if you happen to use common expressions such as “See you later,” or “Did you hear about that?” that seem to relate to a person’s disability.
Don't be afraid to ask questions when you’re unsure of what to do.

Communicating with Individuals Who Are Blind or Visually Impaired

Speak to the individual when you approach him or her.
When conversing in a group, remember to identify yourself and the person to whom you are speaking.
Tell the individual when you are leaving.
Do not attempt to lead the individual without first asking; allow the person to hold your arm and control her or his own movements.
Never touch or distract a service dog without first asking the owner.

Be descriptive when giving directions; verbally give the person information that is visually obvious to individuals who can see. For example, if you are approaching steps, mention how many steps.
If you are offering a seat, gently place the individual's hand on the back or arm of the chair so that the person can locate the seat.

Communicating with Individuals Who Are Deaf or Hearing Impaired

Gain the person's attention before starting a conversation (i.e., tap the person gently on the shoulder or arm).
Look directly at the individual, face the light, speak clearly, in a normal tone of voice, and keep your hands away from your face. Use short, simple sentences. Avoid chewing gum.

Communicating with Individuals with Mobility Impairments

If possible, put yourself at the wheelchair user's eye level.
Do not lean on a wheelchair or any other assistive device.
Never patronize people who use wheelchairs by patting them on the head or shoulder.
Do not assume the individual wants to be pushed—ask first.

Communicating with Individuals with Speech Impairments

If you do not understand something the individual says, do not pretend that you do. Ask the individual to repeat what he or she said and then repeat it back.
Try to ask questions that require only short answers or a nod of the head.
Do not speak for the individual or attempt to finish her or his sentences.
If you are having difficulty understanding the individual, consider writing as an alternative means of communicating, but first ask the individual if this is acceptable.

Dealing with disabilities—one of a dozen things for which your over-committed managers and supervisors may not be fully trained. When everyone's working extra hard, it's all too easy for things to fall through the cracks. So how do you figure out whether supervisors and managers are handling things the right way—the no lawsuit way?

Experts recommend the “simple solution”—an HR audit. It’s the only surefire way to identify problems early and an annual audit, but maybe next week would be better? In either case, to do a good audit, you need audit checklists.

Why Checklists?

Why are checklists so great? Because they’re completely impersonal, and they force you to jump through all the necessary hoops, one by one. They also ensure consistency in how operations are conducted. And that’s vital in Human resources not to discriminate in how you treat one employee over another.

An employer's affirmative action plan and update must address the employer's recruitment, appointment, promotion, transfer, training and career development practices. It must include all of the following components:

1. A workforce profile reflecting total employees and total employees sorted by affected group status. The affirmative action update must also show a comparison between the current workforce profile and the previous submission
2. A utilization and goals report by job group, for each affected group, showing where goals have been set. The affirmative action update must reflect a goals analysis report indicating where goals have been met for the reporting period.
3. A section containing a detailed narrative of the strategies to be employed to reach goals. The affirmative action update must also reflect the strategies employed during the reporting period.
4. A response to the governor's affirmative action policy committee recommendations from previous plan or update.

What must be included in the agency's sexual harassment policy?

Insert Sexual Harassment Policy (4 pages total)

Agencies as defined in RCW 41.06.020 must at a minimum include the following in their policy on sexual harassment:

(1) Indicate who is covered by the policy

(2) Provide that the employer is committed to providing a working environment free from sexual harassment of any kind.

(3) State that sexual harassment is an unlawful employment practice prohibited by Title VII of the Civil Rights Act of 1964 and RCW 49.60;

(4) The definition of sexual harassment as defined by the Equal Employment Opportunity Commission;

(5) Notify the employee or individual of their right to file a complaint with the Washington State Human Rights Commission under RCW 49.60.230 or the Federal Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964.

6) Identify how and to whom employees or individuals may raise concerns or file complaints. The policy should allow multiple avenues for an employee or individual to raise complaints or concerns and should clearly identify the positions or entities charged with receiving these complaints;

(7) Advise all individuals covered by the policy that the employer is under a legal obligation to respond to allegations concerning a violation of the policy;

(8) Identify the manner by which the employer will respond to alleged violations of the policy, including a formal investigation if necessary;

(9) State that the complainant shall be informed of the status and the outcome of an investigation;

(10) Identify the agency's investigation or response procedure:

(11) Define the roles and responsibilities of employees, managers, supervisors, and others covered by the policy with respect to the following:

(a) Preventing or not engaging in sexual harassment;
(b) Responding to concerns or allegations of violations of the policy;
(c) Participation in an investigation under the policy; and
(d) The prohibition against retaliation.

(12) State that confidentiality cannot be guaranteed;

(13) Advise that retaliation against individuals covered by the policy who report allegations of sexual harassment or who participate in an investigation is prohibited;

(14) Advise that any employee found to have violated the policy will be subject to corrective and/or disciplinary action, up to and including dismissal; and

15) Advise that any employee found to have retaliated against individuals covered by the policy who report allegations of sexual harassment or who participate in an investigation will be subject to corrective and/or disciplinary action, up to and including dismissal.

Assuming that you want to establish a fairly comprehensive policy statement, here are the points that you should try to cover:

• **The company's overall aim.** Compliance with the law is obviously your primary aim. However, you may want to underscore this point by stating that top management firmly believes in the principles embodied by these laws. You may include a summary of the applicable EEO laws, executive orders, and Equal Employment Opportunity Commission (EEOC) guidelines in the policy statement, with a sentence or two explaining how each affects employment decision-making.

• **Protected groups.** These are usually listed in the statement of the company's overall aim. But, if not, they should be mentioned explicitly elsewhere. Normally, these "protected groups" include employees of a particular sex, race, color, religion, national origin, or age group (40 years of age and over), and mental or physical disability. Other protected categories include uniformed service, marital status, sexual orientation, and familial status.

• **Areas in which the policy applies.** Try to be as comprehensive as possible in listing the specific areas of employment decision-making in which you would like your supervisors to implement the policy. Your list of these areas should include, but does not have to be limited to, the following: employment, upgrading, transfers, recruitment advertising, recruitment, selection, placement, promotion, demotion, layoffs, compensation, benefits, training, and termination.

• **The role of affirmative action.** If your company has a formal Affirmative Action Program in effect, you may want to outline it briefly in your policy or include a copy as an appendix to this section of the policy manual. Assuming that your company is engaged in some form of affirmative action (whether or not required by law), you will want to either refer the reader to

your policy on affirmative action or briefly describe the way in which the Affirmative Action Program is designed to help you achieve your EEO goals.

• **Responsibility for policy implementation.** There must be an Affirmative Action Plan coordinator. This is a designated individual who is responsible for policy implementation. Explicitly identify the individual or position responsible for implementing and monitoring your policy. No matter who is singled out as being ultimately responsible for achieving EEO goals, the role played by supervisors and managers should not be overlooked.

• **Internal communication.** How will the policy be publicized within the company? Include such communication channels as company publications, memos, an intranet, Web pages, and small group meetings with supervisors and employees. Bulletin boards, employee handbooks, orientation sessions, supervisory training sessions, and even the policy manual itself would qualify as internal communication efforts. Any discussion of such efforts should place particular emphasis on the supervisor's role in making them successful.

• **External communication.** Communication efforts outside the company might extend to advertising, Web pages, employment agencies and recruiting sources, trade fairs, the state job service, unions, customers, subcontractors, key community groups, annual reports, product advertising, and consumer advertising.

• **Identification of problem areas.** Some EEO policies include a section on how supervisors can go about identifying potential problem areas in their units or departments. For example, the policy may tell supervisors how to review their records on promotions for the purpose of discovering whether discriminatory attitudes or stereotyped thinking have played a part in determining who will advance within their departments.

• **Audit procedures.** What steps will be taken at what intervals to determine the status of various EEO programs and goals? Who will maintain and review the applicant log, new hire log, promotion log, transfer log, demotion log, and termination log? How often will application forms be reviewed to ensure compliance with your policy?

• **Action-oriented programs.** The Affirmative Action Plan coordinator must identify problem areas and develop programs to correct issues in order to attain their outlined goals and objectives.

• **Job-posting program.** Your policy should either include or refer to your job-posting policy. How long will positions be posted on bulletin boards? On Web pages? On intranet pages? Furthermore, if certain minorities are underrepresented in your workforce, the availability of the position should be sent to organizations, such as the state job service, at the same time the job is posted in order to recruit applicants within the underrepresented groups. Will jobs be posted in languages other than English?

• **Educational assistance program.** As part of your affirmative action and EEO policy, you may want to include or refer to your educational assistance program. For example, in order to qualify individuals in lower-paying jobs who are members of groups not represented in higher-paying jobs, you may want to provide incentives for education.

• **Work/study programs.** To increase the number of individuals within a particular protected group in your workforce, you may want to include a work-study program as part of

your affirmative action plan. You can use the work/study program to target the particular groups.

• **Recruiting.** Your policy can provide that you will recruit, as hiring needs dictate, through resources that will produce applicants from those groups underrepresented in your workforce. For example, you may want to target a community college, a high school, the state employment agency, or similar organizations as such resources.

• **Internal complaint procedure.** Address how applicants and employees can initiate complaints that you are not complying with your affirmative action policy.

• **Reviewing your policy.** Your policy should state that it will be periodically reviewed and updated in light of any changes in your business or applicable law. It should also state that it is your intent to always be in compliance with applicable law.

• **Coordination with other policies.** Periodically review your other personnel policies for any potential adverse impact on protected groups.

• **Specific policy statements.** The cautious employer will include specific statements concerning each one of the protected groups. A company may want to establish specific policies on the employment of veterans and the disabled.

• **Investigating discrimination claims.** Include not only a mechanism for filing discrimination claims, but also one for investigating them. For example, the investigation should generally be conducted in confidence. You should require employees to cooperate with the investigation and should reserve the right to discipline employees for providing false information in the course of an investigation.

• **Sexual harassment.** You may want to either mention it in your EEO policy or develop a separate policy for it.

Legal Points

1) State law. When designing and reviewing your EEO/affirmative action policy, do not overlook state laws that may afford protection to additional groups. To illustrate, there are state laws that protect individuals from discrimination based on marital status, union activity, whistle blowing, sexual orientation, enrollment in a drug treatment program, jury service, lawful off-duty conduct, testifying in court, family responsibility, political affiliation, personal appearance, garnishment, sickle-cell anemia, arrest record, conviction record, withholding order for child support, parental status, or any other attribute unrelated to the performance of the job in question.

2. Executive Order 11141. This executive order prohibits age discrimination by federal contractors.

3. Executive Order 11246, as amended. This executive order applies to all federal contracts and subcontracts over $10,000. All such employers must have affirmative action policies. Generally, those employers with federal contracts or subcontracts over $50,000 and 50 or more employees must have a written affirmative action plan. Plans for these employers must include:

- An equal employment opportunity policy for personnel actions
- Procedures for disseminating the policy
- Designation of an Affirmative Action Plan Coordinator
- An organizational profile
- A job group analysis
- Placement of incumbents in job groups
- Determination of availability
- Comparison of incumbency to availability
- Placement goals
- Designation of responsibility for implementation
- Identification of problem areas
- Action-oriented programs
- Periodic internal audits

4. Executive Order 11375. This order extends Executive Order 11246 by banning discrimination based on sex.

5. The Federal Rehabilitation Act. The Act applies to federal contracts of $10,000 or more to take affirmative action to employ qualified individuals with physical or mental disabilities.

Plans for these employers must:

- Name the persons responsible for implementing the affirmative action policy.
- Contain an affirmative action policy statement.
- Provide a procedure for disseminating the statement internally and externally.
- Provide for an internal auditing and monitoring system.
- Identify areas of potential discrimination and propose actions to remedy such discrimination.

- Review personnel processes to determine whether present procedures properly consider the job qualifications of known persons with disabilities.
- Schedule a review of all physical and mental job qualification requirements.
- Reasonably accommodate the physical and mental limitations of persons with disabilities.
- Invite persons with disabilities to identify themselves.
- Be updated annually.
- Describe outreach and positive recruitment activities.
- Describe specific action programs to remedy problem areas.

6. The Vietnam-Era Veterans Readjustment Assistance Act (VEVRAA). VEVRAA applies to federal contracts and subcontracts over $25,000. Under the Jobs for Veterans Act of 2002 (effective December 1, 2003), this amount increases to $100,000. Plans for these employers must:

- Name the persons responsible for implementing the affirmative action policy.
- Contain an affirmative action policy statement.
- Provide a procedure for disseminating the statement internally and externally.
- Provide for an internal auditing and monitoring system.
- Identify areas of potential discrimination and propose actions to remedy such discrimination.
- Review personnel processes to determine whether present procedures properly consider the job qualifications of known Vietnam-era and special disabled veterans. (Under the Jobs for Veterans Act of 2002, the coverage is expanded to all covered veterans.)
- Schedule a review of all physical and mental job qualification requirements.
- Reasonably accommodate the physical and mental limitations of special disabled veterans (under the Jobs for Veterans Act of 2002, the coverage is expanded to all disabled veterans) and Vietnam-era veterans.
- Invite special disabled veterans (under the Jobs for Veterans Act of 2002, the coverage is expanded to all disabled veterans) and Vietnam-era veterans and persons with disabilities to identify themselves.
- Be updated annually.
- Describe outreach and positive recruitment activities.
- Describe specific action programs to remedy problem areas.

7. The Veterans Employment Opportunities Act of 1998. This act requires veterans to be permitted to compete for positions with the federal government and applies to federal agencies, the executive branch, the legislative branch, and the judicial branch.

8. Uniformed Services Employment and Reemployment Rights Act (USERRA). This law prohibits discrimination based on military or other uniformed service, (e.g., public health service).

9. Americans with Disabilities Act. This law prohibits employers with 15 or more employees from discriminating based on disability, a history of disability, or association with a person with a disability.

10. Age Discrimination in Employment Act. This law prohibits employers with 20 or more employees from discriminating against individuals age 40 or older.

11. Older Workers' Benefit Protection Act. This law generally sets a standard for a valid release of an age discrimination claim.

12. Title VII of the Civil Rights Act of 1964. This law prohibits employers with 15 or more employees from discriminating against individuals based on sex, pregnancy, race, national origin, or religion.

13. Equal Pay Act. This law provides for equal pay for equal work without regard to sex.

14. Uniform Guidelines on Employee Selection Procedures. These federal guidelines provide nondiscriminatory hiring procedures.

Please keep in mind that the above list does not name every discrimination law that can apply to an employer.

Things to Consider

Because the area of equal employment opportunity contains many legal issues, you should call your company attorney and/or an EEO legal expert when you are unsure of a particular law.

The list below is just a starting point. As you become more familiar with your company's past practices and existing policies in this area, you may be able to add other vital considerations.

1. Your company's history. Are you a federal contractor or subcontractor? Do you receive money from a federal grant? How much federal money does your company receive? How much do you really know about your company's past employment practices regarding minorities and women? Veterans? Individuals with disabilities? What has been your company's track record? Has there been any litigation? Are there any court orders that require specific language? Are there any administrative orders that require specific language? Are there any consent agreements that require specific provisions?

2. Relevant legislation. Thoroughly review all state and federal laws pertaining to nondiscrimination that apply to your organization. Be sure you don't overlook any of the following: Equal Pay Act of 1963, Civil Rights Act of 1964 (with its amendments), Civil Rights Act of 1991, Age Discrimination in Employment Act of 1967 (as amended), Older Workers' Benefit Protection Act, Rehabilitation Act of 1973, Executive Orders 11141 and 11246, Vietnam-Era Veterans Readjustment Assistance Act of 1974, the Jobs for Veterans Act of 2002, Uniformed Services Employment and Reemployment Rights Act and Americans with Disabilities Act. If you are a government contractor, you will want to pay particular attention to Executive Orders 11141 and 11246, the rules regarding veterans, and any other regulations aimed specifically at companies that do business with the federal government or receive federal grants. Consider the implications of other laws, such as the Family and Medical Leave Act, the Immigration and Reform Control Act, the Employee Polygraph Protection Act, the Fair Labor Standards Act, and other laws that prohibit discrimination or retaliation.

3. Composition of workforce and available labor pool. If your company is located in an area that is heavily populated by minorities, or if these groups constitute a sizeable percentage of your workforce, you may want your policy to address the problem of discrimination based on race and national origin in greater detail. You'll also want to highlight ways of communicating your policy to these groups.

4. Existing attitudes among supervisors and employees. Many affirmative action efforts are troubled from the start because the supervisors who are responsible for implementing the program have little training about anti-discrimination laws. If the profile of your supervisory and middle-management group makes it seem likely that they will be less than totally supportive of EEO/affirmative action goals, you might want to offer more training and focus on supervisors' involvement and communication efforts. The same holds true for employees. If your existing workforce has had too little exposure to diversity training, you may want to incorporate special orientation or communication efforts designed to head off resentment and conflicts.

5. Integration with other policies. The principle of nondiscrimination should not be confined to one policy. Review your policies on employment, compensation, benefits, training, and development to make sure there is nothing in them that might contradict or undermine your EEO goals. You might also want to include "EEO reminders" in these other policies. You may need to post your policies on your Web page, especially if you accept applications over the Internet.

7. Programs or guidelines. Provide supervisors with training or written guidelines to assist in applying your policy. Simply saying, "Avoid discrimination in hiring" without going over some of the basic rules of equal employment interviewing is not sufficient. All managers and supervisors should be thoroughly trained on the legal guidelines and company policies that prohibit discrimination.

Chapter # 3 Employment Forms

When conducting a candidate search, it is important to be aware of the employment forms that are required so you are prepared to interview and prepared to hire. Employment forms needed include job applications, W-9 forms, an I-9 form, and a W-4 form.

If the new hire does not have the original documentation that is needed before you can put him/her on the payroll, you will have to put off their hiring until they have the proper documentation.

Employment Forms

There are many pre-employment forms that firms require. But, the only legally required forms are the I-9, and the W-2/W-9. Although having a handbook describing the firm's policies and some reporting information as well as the company Mission Statement, is a

very good idea. But for our purposes let's look at the main forms; job applications as well as the required forms the I-9, and W-4/W-9.

Job Application Forms

Many employers require candidates for employment, even for top level positions, to fill out an application so they have documentation of experience and education. Applicants will need to provide details and dates of past employment and education, as well as of credentials and certifications.

Insert Application for Employment (2 pages total)

I-9 form

The Immigration Reform and Control Act of 1986 (IRCA) legally mandates that U.S. employers verify the employment eligibility status of newly-hired employees. IRCA made it unlawful for employers to knowingly hire or continue to employ unauthorized workers. In response to the law, the Immigration and Naturalization Service (INS), now an integrated component of the Department of Homeland Security (DHS), created Form I-9 and mandated its accurate and timely completion by all U.S. employers and their employees.

Form I-9 is a three-part document. The law requires that the employee complete Section 1 at the time of hire or when the employee begins work. Section 1 may also be completed at the application stage so long as the practice does not discriminate. The employer must complete Section 2 within three business days of hire and certify that the employee's documents of identity and work authorization appear to be genuine and belong to the employee, be sure to read the information on what type of documents will be accepted. Section 3 is completed by the employer when it is necessary to update or re-verify an employee's work authorization document(s).

Insert Form I-9 (5 pages total)

While most employers attempt to fully comply with IRCA, many routinely and unknowingly accept I-9 Forms with fraudulent supporting documents. The passage of the Sarbanes-Oxley Act and increased public exposure of troubled companies has heightened employers' awareness of legal compliance issues to new levels. It is prompting many to decide that it's in their best interest to retain an independent, non-governmental entity to conduct I-9 audits as a preventative best practice.

The Risks of Non-Compliance

Employers who fail to fully comply with IRCA face significant legal, financial and public relations risks. Non-compliance, whether intentional or simply caused by oversight, has severe consequences imposed by the DHS, as well as the potential of a corporate image tarnished by negative publicity. Unfortunately, most employers are unaware that they have

a problem with Form I-9 employment verification requirements until they are audited by governmental authorities. By that time, it is generally too late to undo the damage.

The following is a partial list of federally mandated fines:

- For employers who fail to properly complete, retain, or make I-9 Forms available for inspection, fines range from $100 to $1,100 per individual I-9.
- For employers who knowingly hire or knowingly continue to employ unauthorized workers, civil penalties range from $250 to $11,000 per violation.

For employers engaging in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers, fines can be as much as $3,000 per employee and/or 6 months of imprisonment.

The W-9

The W-9 is used by a company to request the name, address, and Social Security number for an independent contractor who will be providing services to the company. Another term for an independent contractor would be consultant or freelancer. There's a distinction made between independent contractors and employees. They are treated differently in how their income is taxed and reported to the IRS.

Insert Form W-9 (one-page total)

For example, if I hire a Web designer to redesign my web site, I would ask them to fill out a W-9. I would then use that information, first, to verify their name and address; and second, to issue them tax form 1099-MISC at the end of the year. Form 1099-MISC is used to report money paid to contractors for their services. This form is send to both the IRS and to the contractor.

Like all tax forms, the information on a W-9 must be kept private, secure and confidential. Any person or company that discloses tax information without the person's permission can face severe penalties. In this sense, it is better to safeguard any social security numbers and other tax information. The company is required to obtain your legal name and SSN using Form W-9 if the independent contractor will be earning more than $600 from the company during the year.

W-4

The W-4 Form is completed by an employee, so the employer can withhold the correct amount of federal income tax from their pay. When a person is hired for a new job, they will be required to complete a W4 Form to let payroll know how much tax to withhold. The employer should never help with the W-4. This would be giving out legal advice.

Prior to starting employment, an employee can fill out a PDF version form online and print it out. It's also a good idea to review withholding amounts on a regular basis to ensure the appropriate amount of tax is withheld. There are extensive directions for filling this form out.

Chapter #4 Employee Compensation and Benefits

Introduction to How Employee Compensation Works

Your employee compensation and benefits package can be the deciding factor for many potential employees. And it's not just the money. To make your company competitive and attractive to job candidates, you may have to offer an exceptional total benefits package. That makes it a very important part of your business planning and management process if you hope to hire (and retain) top employees.

So how do you make your benefits package attractive and competitive without financially jeopardizing the success of your business? How do you get the best deals on insurance? What perks can you offer that won't cost you additional money, but will mean a lot to your employees? Are stock options the way to go? How do you set salaries? What benefit costs are tax deductible? There are many more questions as you start thinking about how to set up and manage these policies.

In this chapter, we will answer some of those questions and direct you to resources to assist you in finding other answers.

Setting Up Your Compensation Structure

Although money isn't everything, it certainly is one of the top issues potential employees look at when interviewing new companies. (Yes, face it, they are interviewing YOU.) Whether you're offering a straight basic salary structure or an incentive-based pay structure, this may make a world of difference to top job candidates. Let's look at how each system works.

A standard base pay program offers fixed salary ranges for each position type for employees performing the standard duties of their jobs. There are minimum and maximum levels within those pay ranges to account for variations in experience and skill levels. When setting the base pay structure, determine where your company falls within your own industry as well as competing industries that may also offer job opportunities for your employees. If your pay levels are not competitive, you may risk losing employees. You can use the Internet to find industry-standard salary levels for specific jobs in specific geographical areas.

Once your base pay structure is in place, most companies then set up a merit pay program that will take the employee through the salary range for their position at a performance-driven speed. This is determined when the employee's manager does an annual or semi-annual employee performance review. The downside of this is that employees may begin to see it as a given that they will get a salary increase after each evaluation, and it ceases to

be a motivation to perform better in their jobs. For this reason, more companies are moving toward more of a reward-based compensation style, also called incentive compensation.

Incentive-based compensation is becoming much more common because of the increased emphasis on performance and competition for talent. This type of compensation structure significantly helps motivate employees to perform well. Hiring bonuses are also frequently used. However, you might want to tie in a specific time period prior to the employee collecting this bonus -- for example, one-half after six months and the remainder after one year of employment. Otherwise, you could run the risk of the employee departing after that first check, which would defeat your purpose.

Setting up an incentive-based compensation program requires the same research into your industry as the base pay program. You'll still establish base pay levels, but it may be slightly lower, and you will build into that base the annual or quarterly (or any other interval) bonuses, commissions, or other types of compensation.

In the next section we'll talk about other forms of compensation, including bonuses, commissions, and vacations.

Forms of Compensation

Bonuses should be based on achievement and should include all of your employees. Don't limit your incentive program to certain employees, or you might limit your company's potential. You'll also lose the benefit of the team-building effects of incentive-based compensation. If everyone is going after the same goal, they'll have a better chance -- and your company will have a better chance -- of succeeding.

Rewards should also be based on solid results and not simply the activity level of the employee.

Tying your employees' compensation to the results they produce will help them focus on the company's bottom line. You can also tie in long-term incentive compensation in the form of stock options and deferred compensation plans (more about stock options later in this chapter). These types of plans not only compensate your employees for good work, but also help retain them.

For your sales staff, an incentive-based pay structure will almost always produce better results than a straight pay structure. Although your customers may experience a less-pressured sales pitch from a salaried sales representative, they may not purchase as much. Putting in place a commission-based pay structure for your sales staff can directly affect your sales numbers. If their income is directly related to their performance and no ceiling is placed in their way, then the sky really can be the limit. If you have talented sales staff, they will thrive in this type of environment; if you don't, then they usually won't. If you can detect who is producing and who isn't, you can determine who requires some additional sales training.

There are also disadvantages to commission-based pay structures for sales staff. Often, employees focus entirely on the sale of items that give them the highest return for their time and don't really take into consideration the actual needs of the client. Customer service may also suffer because the sales representative has moved on to the next high-dollar sale. You have to make sure you have a good combination of both a base salary and sales commission. Your base salary must be sufficient to attract good candidates, but not so good that you'll get employees satisfied with the base amount even if they don't make any sales!

In addition to regular benefits packages that include health insurance, vacation, and retirement plans, employees seem to be actively seeking companies who offer more of the things they value. Balancing their lives is becoming more important than ever. Because of this, other benefits like flexible schedules, relaxed atmospheres, childcare and other lifestyle benefits are becoming almost as important as salaries. In fact, according to data compiled by WorkLife Benefits, 90% of 1,000+ employees polled by the Gallup Organization in 1998 said that work/life balance is as important as health insurance. More than one-fourth of surveyed workers said that balancing work and family is more important than a competitive salary, job security or support for an advanced degree. But these other perks, as well as other intrinsic rewards, can definitely have a strong effect on how employees feel about their employer and their work environment, and can help retain employees who might otherwise leave. We'll talk more about other added benefits throughout this chapter.

Health Insurance

Insurance premiums will probably cost you about 8% to 10% of your payroll amount. The majority of this will be your health insurance premiums. So, what are your options and how do you find the best deal? There are currently three main types of health coverage you can offer to your employees: traditional coverage (fee-for-service), HMO (health maintenance organization), or PPO (preferred provider organization).

With a traditional health coverage plan, your employees will have the most flexibility. They can see the doctors they want to see, go to hospitals all over the country, and change doctors whenever they want to. These plans are, however, more expensive and usually don't cover preventive health care like physicals, immunizations, and well-child care. There are three variations of traditional fee-for-service coverage: basic, major medical, and comprehensive. Basic covers some of the costs of a hospital room and care, but not everything. Major Medical begins where Basic leaves off, and Comprehensive is a combination of the two.

With traditional health coverage, employees will have to pay a deductible (usually $250 to $500 per year) before the insurance begins paying anything. At that point, the insurance company begins paying 80% and the employee is responsible for the remaining 20% of all medical bills. They do usually have a "cap," which is a limit on the amount the employee will have to pay in one year. Once the cap is reached, the insurance company pays the excess.

There may also be limitations on how much the plan will pay for particular services. These are called "customary fees." If an employee's doctor charges more than the average

amount for a particular procedure, then that employee is responsible for the remainder of the bill.

One of the controversial types of coverage is the health maintenance organization (HMO). HMOs are basically prepaid health plans. With an HMO, employees can only go to specific groups of doctors that are either owned by or have contracted with the health maintenance organization.

Small co-payments of $5 to $25 dollars are made by employees for office or emergency room visits, and the services are sometimes limited. Usually employees are required to select a primary care physician (PCP) who will monitor their health and make any necessary referrals to specialists. They typically can't see a specialist unless the PCP approves and makes the referral (unless they want to pay for it themselves).

HMO's operate on the premise that if they keep you healthy and take care of small problems before they become large ones, then they'll make more money over time and people will be healthier. Because of this, they usually do cover preventive care like physicals, well-child check-ups, etc. They also usually have less paperwork for patients to fill out.

The last health insurance option is the preferred provider organization (PPO). PPO's combine the best of both the traditional insurance and HMO coverage. Like the HMO, there is a list of providers that your employees have to choose from (a network) and they must select a primary care physician. They don't have to fill out much paperwork when they go for a visit, pay a small co-pay, and most preventive care is covered. The difference is that they can also go outside of the list of approved physicians to any doctor they want. They just have to pay more and fill out claims forms.

Some employers also include dental coverage and vision coverage. Typically, dental coverage pays 100% of preventive services, 80% of procedures such as fillings, and 50% of major procedures such as crowns. Vision coverage will usually pay for one vision exam per year and one pair of glasses.

It pays to find a good broker when looking for health insurance policies. The broker may represent plans from up to 15 different insurers, allowing you to understand what is available and do comparison shopping. Be aware, though, that most insurers will only prepare a quote for your company once, so be sure you have selected a good broker before getting quotes.

When you're evaluating the plans, check the deductibles and co-insurance rates. Also, check on typical charges from local doctors to make sure the maximum reimbursement for a particular procedure is not too low.

Next, you'll need to check out the insurers. You can find out about their financial health at Standard and Poor's. In addition to their financial health, you'll also need to investigate their

claim payment history. You don't want an insurer who doesn't want to pay claims. Your broker should be able to help you in this area.

Compare their pricing, their services, their service areas and lists of physicians (if HMOs or PPOs), and remember, your employees (and you) will have to live with your choice -- so do your homework! You can get a list of registered health underwriter brokers in your area by contacting the National Association of Health Underwriters.

If you have a small business, you can call your state department of insurance to find small business group health providers in your area, or else look into a health purchasing alliance or association plan. These plans allow small businesses to purchase insurance as part of a larger group.

Health purchasing alliances provide a needed service for small businesses by providing a way for them to purchase group insurance at lower fees than they normally could. The alliance purchases the health plan for its members (small businesses) and has a third-party administrator manage the plan.

Be prepared for the underwriting process with this type of group coverage. It will often involve all employees filling out a questionnaire regarding their health as well as their family's health. Also, check into the operations of the alliance to ensure that all of the funds are managed correctly.

You can also check with trade, professional and other associations to see if they offer group health coverage.

Disability and Life Insurance, Long and Short-Term Disability

In the United States, short-term disability (STD) is not provided by many employers, however, some states do require it for up to 26 weeks. It is designed to replace an employee's income on a short-term basis as a result of a disability and is usually equal to about 60% of the employee's gross weekly pay. This way, the amount the employees draw is closer to the amount of lost income that the employee actually took home (net) prior to the disability.

Long-term disability (LTD) is not required by law, but some companies do offer it as a standard benefit. Some companies pay for short-term disability and make the long-term optional, sometimes at a reduced cost to the employee. The logic behind this is that you want the employee to come back to work after a short, unforeseen accident or injury -- employers rarely see an employee come back from a long-term disability. Also, there are many variables in selecting the policies, everything from the exclusion period, which can be based on different time periods if it's an injury or illness, to pre-existing condition limitations, self-reported claim limitations, own-occupation protection, and rate guarantee. And, if the company pays for the benefit, it is considered taxable income; if the employee pays for the benefit, it is considered insurance and is non-taxable.

Life Insurance

The most common life insurance coverage for employees is a policy equal to their salary. In most cases, the employer pays the entire premium. Some companies also allow the employee to purchase additional coverage for family members or themselves at a low

monthly cost. The insurance rates will be evaluated every five years to account for rising (or falling) average ages of employees, so rates may fluctuate depending on the demographics of the business.

If your business has fewer than 10 employees, you probably won't be able to purchase group life insurance.

Next, let's go over paid leave. Not only do you have to pay your employees when they work, but you sometimes have to pay them when they don't.

Paid Time Off

You'll spend about 10% of your payroll on paid time off. Paid time off is a very highly rated benefit, especially with so many workers trying harder to balance work and family life.

Most companies provide paid holidays for all of their employees. The national average is 10 1/2 paid holidays per year. In addition to standard holidays, some companies also provide one to two floating holidays or personal days. These days can be used whenever the employee would like to use them and often make up for religious holidays that are not part of the company's standard paid holiday schedule.

The average number of vacation days provided for new employees is 10 per year, with increases to 15 after five years and 20 after 10 to 15 years. Vacation time is accrued on a monthly or quarterly basis, and most companies use a calendar year to make their recordkeeping easier.

Most companies provide 6 to 9 sick days. Unlike vacation time, the number of sick days companies offer typically doesn't increase as the years go by. Some companies allow employees to use their paid sick days to also take care of family members who are ill. Make sure you set a policy and stick to it.

Some companies (about 25%) offer one larger lump of paid time off (PTO) that can be used however the employee sees fit. A typical scenario might be to provide three weeks of paid time off for the first five years, then step up the amount to four weeks after 10 years, and so on.

In either the paid vacation or PTO situations, employees would have to request the time off in advance, except for emergencies. The time can typically be taken in half-day increments. The time is accrued on a monthly or quarterly basis and banked until the employee uses it. If the employee leaves the job, the employee is usually paid for the banked time.

Whether you allow unused vacation days or PTO to carry over to the following year is up to you. Some companies allow a certain number of days to carry over, but any days over that number are lost. Others allow employees to get special permission from their managers to carry over days with the stipulation that they be used by a certain date the following year.

Other Leave and Benefits

Jury Duty, Military Leave, and Bereavement

There may also be leave for jury duty, military leave, and bereavement. You need to have policies in place to address these so that you know you're handling them consistently. Typically, companies allow up to two weeks per year for jury duty or military leave and up to three days per year for bereavement.

Domestic Partner Benefits

The focus of most domestic partner benefits seems to be health care, but many also cross over into life insurance, family leave, and other areas.

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Stock Options/Profit Sharing

Often used as a tool to retain employees, stock options have a growing appeal in today's job market. Depending on the business and industry, stock options can be a very valuable and enticing benefit to offer employees and potential employees. Deciding to offer stock options is quite simple. Deciding on the type of option plan may be difficult.

There are three classes of stock options: incentive stock options (ISO), employee stock purchase plan options, and nonqualified options.

The most popular plans are ISOs and nonqualified plans. With both of these plans, the employee is offered a specific number of shares that they can purchase (exercise) on a specified date. The shares can be purchased at the value of the stock at the time the option was granted. So, if the stock's value has increased when the employees exercise their option, then they get a good deal; if not, then the stock options are worth nothing.

These two plans differ in the way the money is taxed. With ISOs, the employees pay no taxes until they later sell the shares they have bought (exercised). At that time, any profit they made off of the transaction is subject to capital gains tax instead of income tax. Another thing to consider is that there is no corporate deduction when the employee exercises the option.

With nonqualified plans, the tax situation is different. Employees will have to pay income tax on any gains they made when they exercised their options (assuming the employee is making a profit based on the current value of the stock). For example, if the stock was valued at $2 per share when the options were granted and is valued at $5 when the options are exercised, then ordinary income tax must be paid on the gain of $3 per share. There

can also be a corporate deduction on the same amount. Later, if the employee keeps the stock and it increases more in value, then they will only owe capital gains tax on the additional increase in value when they sell.

Employee stock purchase plans are another option for employers who want to lure new recruits. Unlike the ISOs and nonqualified plans, employee stock purchase plans are usually offered to all eligible employees. Employees can purchase the stock at usually about 85% of its market value. Most companies allow employees to purchase stock amounts up to 10% of total pay and offer payroll deductions for payment.

Another lesser-known option particularly appealing for small and private companies is the phantom-stock plan. Phantom-stock plans operate in a similar manner as the other stock options, but the risk of sharing equity in the company isn't there. You can issue shares to your employees at a set price based on your company's current value, then on a specified future date reevaluate the company's value. If the stock has risen and the employee wants to sell, then you cut a check to the employee for the increased amount. Your employee will pay tax on the additional "wages," and your company can take a tax deduction.

Profit Sharing Plans

About 40% of companies offer profit sharing plans. Profit sharing programs require setting up a formula for distribution of company profits. The formula is usually based on 5% to 6% of the employee's salary. They usually include a vesting period of up to seven years. The good thing about profit sharing plans is that they allow you to decide if and how much your company contributes to the plan. During less profitable years, you may opt to not contribute. It also lets you control how the money is invested and is not as expensive to administer as other plans.

Employee Stock Ownership Plans (ESOPs)

ESOPs are the most common form of employee ownership in the United States. They allow your employees to own a part of the company without requiring them to purchase stock. Your company can be either public or private, and stock is usually transferred to the employees through annual contributions. ESOPs, like the other employee stock ownership methods, can improve your bottom line through employees' heightened awareness and vested interest in helping the company become successful. If you are interested in transferring some or all ownership to your employees, then this might be a good option for your company. The contributions are tax deductible, you can borrow against the ESOP, and stock owners can sell their shares back to the company when they leave and escape paying taxes if the money from the sale is transferred into another security. ESOP accounts are tax deferred until retirement.

Retirement Plans

Your company's retirement (or pension) plan is not only good for your employees, but it's also one of the best tax shelters available -- both for your company and your employees. You can deduct contributions, and the contributions are tax deferred to the employee.

Pension plans fall into two categories: defined-contribution pension plans and defined-benefit pension plans.

Defined-benefit pension plans are plans that have a set benefit, and contributions that a company makes to the plan are based on actuarial assumptions. Your employee will know what their retirement amount will be and can plan accordingly.

Defined-contribution pension plans base your employees' benefits on the amount of money contributed to the account. Some of the types of accounts that fall into this category include: profit-sharing pension plans, money-purchase pension plans, target-benefit pension plans, stock-bonus pension plans, ESOPs, thrift savings pension plans, and 401(k) pension plans.

401(k) Plans

The most popular of the defined-contribution pension plans is the 401(k). It has been around since 1978, and allows employees to contribute up to $12,000 of pre-tax money ($12,000 as of 2003; this increases by $1,000 each year until it reaches $15,000 in 2006), which is the highest of any of the pension plans. The employee and employer combined cannot contribute over $40,000 annually (or an amount equal to the employee's salary, whichever is less) to the employee's account.

401(k) plans let your employees save for retirement easily and conveniently through pre-tax automatic payroll deductions. It's money they don't see, so they don't miss it. Implementing a 401(k) plan can improve employee morale and help in luring in new employees. The money your employees contribute, as well as your contributions and their account earnings, are all tax deferred until they actually withdraw the money when they retire. Employees have full control over their investments. Withdrawals are also permitted at termination of employment or during financial hardship, but a 10% penalty tax is charged if they are younger than 59 1/2 years old. Many companies allow terminated employees or employees who elect to leave the company the option to keep their 401(k) account, but they can no longer contribute to it.

As an employer, you are not required to match contributions or contribute at all to your company's 401(k) plan; however, to be competitive, many employers do. You do have the flexibility to alter your contributions year to year based on the profitability of your company. You even have the option of contributing on behalf of employees who aren't participating as long as they are eligible. Your contributions are tax deductible, like with the other plans. You can also set up a vesting schedule for the contributions you make to your employees' accounts. This is just another way to help motivate employees to stay with the company longer.

The down side of 401(k) plans is that they are usually expensive to administer.

Money Purchase Plans

Money-purchase plans are like profit sharing plans that require a set amount (usually a percentage of the employee's salary) be contributed by the employer each year, even in years where there is no profit. Employees can contribute up to 25% of their salaries or a maximum of $40,000 per year. On the flip side, money-purchase plans give employers the maximum tax advantage possible.

SIMPLE IRA

If you have 100 or fewer employees and offer no other retirement pension plan, the Savings Incentive Match Plan for Employees (SIMPLE) IRA provides a simplified way to make contributions to a retirement plan either for yourself if you're a sole proprietor, or for your employees. With this plan, your employees can make monthly contributions (salary deferrals), and you, as the employer, have the option of two types of contribution methods. You can either match the first 3% of the employee's contribution dollar for dollar, which by the way does help encourage participation by your employees, or you can opt to make a non-elective contribution equal to 2% of your employees' pay. If you choose to match your employees' contributions, you do have the option of altering the amount to fall somewhere between 1% and 3% for two out of every five years.

Your employees can contribute up to $8,000 in 2003, and no other contributions -- other than your employer match or non-elective contributions -- can be made. If the employee is less than 59 1/2 years old and hasn't contributed to the plan for at least two years, then withdrawn funds may face a 25% penalty tax.

The SIMPLE IRA has lower administrative costs than other plans. The plan is simple with regard to reporting requirements, and it isn't subject to nondiscrimination and top-heavy rules that limit the benefits provided to your highest paid employees. Your contributions are tax deductible. Your employees will be immediately 100% vested. They can set up their investment portfolios to suit their own goals and situations. They can also roll the account over to another SIMPLE IRA account with no tax penalty.

SIMPLE 401(k)

The SIMPLE 401(k) plan has many of the same requirements and features as the SIMPLE IRA, but it allows your employees to contribute a pre-tax portion of their salary. This plan will give your company a leg up in more competitive job markets. As with the SIMPLE IRA, you must have fewer than 100 employees and offer no other employer-sponsored retirement plan. Your contributions are tax deductible for your business, and you can contribute up to 15% of your eligible employees' salaries. Employees can invest up to $8,000 in 2003, can tailor their own investments, can borrow from their accounts, and earnings are tax-deferred until they are withdrawn.

Simplified Employee Pension (SEP) Plan

An SEP plan is basically individual IRAs set up for all of your employees that aren't subject to the $2,000 per year IRA limit. As an employer, you can contribute up to 25% tax deferred of your employees' annual salaries (up to $40,000), and can set the plan up at any time during the year. Your employees can control how their accounts are invested and are full-owners (there is no vesting period) from the very beginning. Your employees do, however, have to be at least 21 years old, and have to have worked for your company for at least three of the past five years.

There are several benefits of an SEP plan. They are simple to set up and administer, and you have no government filings to maintain because the employees are responsible for their

own accounts. You can change your contributions at any time, and the contributions are still tax-deductible for your business. To set one up, you have to implement a written agreement to provide benefits to your eligible employees, give the eligible employees information about the SEP and have them set up SEP-IRA accounts (or you can set up the accounts for them).

Aside from the common benefits discussed thus far, there are many other forms of benefits you can offer your employees.

Other Benefits and Policies

There are many other benefits you can offer your employees that will give your company an edge in recruiting and retaining talent and provide your employees with some of the things that make work a little more rewarding. Added benefits make your organization more effective on many levels. Issues like childcare, education assistance, adoption assistance and flexible schedules can help your company gain an advantage over the competition and find and retain your most important resource. Good benefits and company perks can improve employee morale and, in turn, have a very positive affect on your bottom line. Let's go over some of the other benefits you can offer your employees that will give your company a competitive edge in recruiting.

Dependent Care Assistance

According to a study by WorkLife Benefits in Cyprus, California, 20 percent of non-working mothers of young children do not work because they see quality childcare as unaffordable or unavailable. Dependent Care Assistance is not limited to childcare. It can be elder care, or care for any family member. Employers can offer flexible working arrangements, care resources and referrals, financial-planning assistance, long-term care insurance, and dependent-care assistance accounts. You can also provide educational services for your employees to help them learn more about their options.

You may also consider opening a company-sponsored childcare center. There are many benefits, including a boost in your company's ability to recruit and retain employees. Company productivity will be increased because your employees have reliable childcare and fewer absences. It also helps give your company more of a family-oriented reputation, which in today's workplace is a definite plus. The downside to a company-owned childcare center is the fact that you have to keep the center going even if your employees have few children. You'll also be paying up to one-third of the expenses of the center if you want it to be affordable for your employees. For some companies, this is the perfect solution; for others it isn't. But most who have existing centers believe they have definitely saved money over the long run.

Adoption Assistance Programs

An adoption-assistance program for your employees can range from simply providing resources and recommendations, to paid maternity or paternity leave, to providing financial assistance for your workers who are trying to build families through adoption. Many companies are now beginning to provide adoption assistance services.

Outplacement Services

Outplacement services are services a company offers to assist their employees quickly find new job opportunities when drops in revenue, reorganizations, and other reasons force a cut back in staff. This assistance can come in the form of group programs, support programs and one-on-one consulting with an external consulting group.

Education Assistance Programs

Many employers offer assistance for employees who want to gain additional education or degrees. Investing in job related training and education for your employees can improve the abilities of your employees to do their jobs.

Employee Achievement/Merit Awards

Honoring your employees who have high achievements is not only a good way to improve morale and loyalty, it's just a nice thing to do. Often all employees really want is just a verbal acknowledgement of a job well done. Of course, throwing in some monetary thanks is also appreciated.

Golden Parachutes

These are contracts you set up with your top executives that will provide them with special benefits in the event they lose their jobs due to takeovers or acquisitions by another company. These benefits are typically quite generous and come in the form of a large severance package, a large one-time bonus that only comes when employment is terminated.

Cafeteria Plans and other Flexible Benefit Plans

Cafeteria plans are a type of flexible benefit plan that let your employees choose from a list of benefits they wish to participate in. Choosing to participate will often allow the employee to reduce their taxable income because they are paying or contributing with pre-tax dollars.

There are five main types of these flexible benefit plans. They include:

- Premium-Only Plans - With this type of plan, employees can pay their portions of the insurance premiums with pre-tax dollars.
- Spending Accounts - This plan allows your employees to put aside pretax money into accounts to be used for dependent care or medical bills.
- Full Flexible Benefit Plans - These plans give employees both a choice in selecting from the menu of benefits, as well as an allowance to spend on those benefits. Any benefits they want to add that will be more than their allowance would be paid for with pre-tax dollars in some cases and post-tax in others.
- Variable Credits - This option allows you to base the employee's allowance on their performance or certain health aspects such as smoker vs. nonsmoker, seat belt use, and other criteria. Credits are given based on these factors.
- Modular Plans - This type of plan puts your employee's choices into packages. Usually the packages are set up with specific groups in mind so they can target their

needs. They are divided into groups based on demographics such as young single workers, families, and older couples.

Employee Assistance Programs

Employee Assistance Programs (EAP) are provided by many employers. These programs provide employees with somewhere to turn in the event of a personal problem that affects all aspects of their lives, including their jobs.

These programs encompass a large counseling element, although their goals are to maintain and even improve your company's production. The EAP can help your employee determine the problem and find the right kind of help. They can also help management have a better understanding of the types of problems their employees may be facing, both personal and work-related. Some of these problems may be stress that is related to job security, conflicts with others in the workplace, divorce or other family problems, substance abuse, or financial problems.

Other Benefits to Think About

- Paid moving expenses
- Transportation discounts
- Leave sharing plans
- Scholarships
- Low-interest or interest-free loans for employees or direct deposits for paychecks

Flex Time

Allowing flexible work schedules in your business is very often the most strategic thing you can do from a hiring standpoint. Often companies that offer flex time find that their employees are more productive, motivated, and loyal. And why wouldn't they be? Employees can alleviate quite a bit of stress from life just by coming in to work an hour earlier and leaving an hour earlier to missing the commute hour and giving them more time with their families.

Telecommuting

There are always situations where telecommuting simply won't work. You obviously can't let your receptionist telecommute, because who would be there to receive! And, chances are that many of your employees aren't even interested in telecommuting. For those that are, however, think about the benefits to both them personally and to the company. The company can use the office space for other employees, storage, equipment, or a break room. You can simply set aside an area to be used by your telecommuters when they do venture into the office. You can experience the benefit of added productivity by your telecommuters. Lack of interruptions is one of the biggest perks of telecommuting. How many times have you had a tight deadline and an endless parade of co-workers stopping by your office to tell you the latest joke from the water cooler? More than you can count probably. You'll also benefit from the increased loyalty and boosted morale of your telecommuting workforce. Face time in an office may be over rated. Today, you have to

measure an employee's worth by what they produce, not by how many hours you see them sitting at their computers (or in the break room, or at their co-worker's desk).

The benefits for your employees who telecommute can also be quite substantial. They can save time since their commute is only a brief stroll to their home office (or porch). They also benefit from a quieter and less interrupted environment. They can work whenever the inspiration hits them, too. Or if they have an appointment in the afternoon they can make up the time later that night.

It is quite possible you'll get more work out of employees that you allow to telecommute than the ones that you don't. You do need to investigate potential problems such as liability insurance, workers' compensation issues, office equipment, and confidentiality issues. These may bring to light problems for telecommuting in your line of business. You also need to make sure you have a written policy about how your telecommuters need to operate. For instance, you may make it a policy that your telecommuters have to be accessible during regular office hours even if they're working schedule is slightly different. You may also want to set up a reporting schedule to replace your usual eyeball-to-eyeball meetings to make sure you know at regular intervals where your employees are with projects, or other work. Some other key issues to consider are the relationships you have with your telecommuting employees. Make sure you're not leaving them out of meetings and decisions they should be involved in just because they didn't happen to be in the office at the time. Continued communication is crucial. Think through the process and make sure you cover all bases. If you have to get a proposed telecommuting program approved by upper management, it also helps to have statistics from similar companies that have successful telecommuting programs.

Discounts for Your Employees

If your business offers a commercial product or service that your employees would otherwise have to pay for, then it may make sense to allow them the perk of getting it for free, or at least at a reduced cost. Your company can get a tax break, the employee gets a good deal, and good will abounds for all.

Working Condition Benefit

Known as the working condition benefit by the IRS, you can also allow your employees to use company cars, computers, PDAs, etc., for personal as well as company business. Make sure you have a written policy and have checked your insurance coverage before granting this benefit.

On-premises Exercise Facilities

A fit employee is a healthy employee, and a healthy employee is a productive employee. Or so it would seem. If you have on-site exercise facilities that your employees can have access to free of charge, then you've got a good perk waiting to happen. If you don't already have the facilities as part of your business, then perhaps you should consider setting up a small workout room with some basic equipment or put in a shower and set up some running/walking trails around your business's property. Exercise not only relieves stress and

improves health, it helps clear the mind and fosters creativity. Your employees may even acquire some team building skills if you start a company sports team.

The Competition

So, we've talked about a lot of ways to set up a good benefit program for your employees and how your benefits and perks are often more important than the salary, but what will really stand out to potential employees? What do they really look for? One of the most important things to keep in mind when planning or tweaking your benefits package is that there is a strong and growing trend toward helping employees balance their work with their family lives. People are no longer just wishing there was an alternative - they're making alternatives. If you make a concerted effort to allow your employees to not only do their jobs but to still have time to live their lives, you'll be rewarded with loyalty, productivity, and strong workforce.

Here are a few suggestions for creative benefits to add, but don't stop here. Poll your employees and see what they would like to see added to the benefit list: Special guest speakers (monthly, quarterly, whatever you can do)

- On-site classes about topics that interest your employees, such as personal finance, yoga, home buying, childcare issues, etc.
- Special company-sponsored meals (Like Pizza Fridays, or Days of Perpetual Eating!)
- Office games
- On-site massages
- Special-recognition gift certificates
- Set up a special Sunshine committee to come up with fun treats and activities for employees
- Regular staff parties and get-togethers (on work time, not personal time!)
- On-site dry cleaning pick ups
- On-site film-processing pick ups
- An employee Web site that features photos from staff parties, family photos, etc.
- On-site stores offering items that employees typically have to go out at lunch for.
- A company restaurant that also offers take-out meals for dinners.
- An ATM machine.

Chapter # 5 Tax Compliance

The following is a list of important dates.

If any date shown below for filing a return, furnishing a form, or depositing taxes falls on a Saturday, Sunday, or federal holiday, use the next business day. A statewide legal holiday delays a filing due date only if the IRS office where you are required to file is located in that state. For any due date, you will meet the “file” or “furnish” requirement if the envelope containing the return or form is properly addressed, contains sufficient postage, and is postmarked by the U.S. Postal Service on or before the due date, or sent by an IRS-designated private delivery service on or before the due date.

By January 31

Furnish Forms 1099 and W-2. Furnish each employee a completed Form W-2, Wage and Tax Statement. Furnish independent contractors with a completed Form 1099

File Form 941 or Form 944. File Form 941, The Employer's QUARTERLY Federal Tax Return, for the fourth quarter of the previous calendar year and deposit any un-deposited income, social security, and Medicare taxes. An Agency may pay these taxes with Form 941 if their total tax liability for the quarter is less than $2,500. File Form 944, Employer's ANNUAL Federal Tax Return, for the previous calendar year instead of Form 941 if the IRS has notified you in writing to file Form 944 and pay any un-deposited income, social security, and Medicare taxes. You may pay these taxes with Form 944 if your total tax liability for the year is less than $2,500. For additional rules on when you can pay your taxes with your return, see *Payment with return* on page 21. If you timely deposited all taxes when due, you have 10 additional calendar days from the due date above to file the appropriate return.

File Form 940. File Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return. However, if you deposited all of the FUTA tax when due, you have 10 additional calendar days to file.

File Form 945. File Form 945, Annual Return of Withheld Federal Income Tax, to report any non-payroll income tax withheld in 2008. If you deposited all taxes when due, you have 10 additional calendar days to file.

By February 15

Request a new Form W-4 from exempt employees. Ask for a new Form W-4, Employee's Withholding Allowance Certificate, from each employee who claimed exemption from income tax withholding last year.

On February 16

Exempt Forms W-4 expire. Any Form W-4 previously given to you claiming exemption from withholding has expired. Begin withholding for any employee who previously claimed exemption from withholding but has not given you a new Form W-4 for the current year. If the employee does not give you a new Form W-4, withhold tax as if he or she is single, with zero withholding allowances. However, if you have an earlier Form W-4 for this employee that is valid, withhold based on the earlier Form W-4.

By February 28

File paper Forms 1099 and 1096. File Copy A of all paper Forms 1099 with Form 1096, Annual Summary and Transmittal of U.S. Information Returns, with the IRS. For electronically filed returns, see *By March 31* below.

File paper Forms W-2 and W-3. File Copy A of all paper Forms W-2 with Form W-3, Transmittal of Wage and Tax Statements, with the Social Security Administration (SSA)..
File paper Form 8027. File paper Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, with the IRS.

By March 31

File electronic Forms 1099, 8027, and W-2. File electronic Forms 1099 and 8027 with the IRS. File electronic Forms W-2 with the SSA. For information on reporting Form W-2 information to the SSA electronically, visit the Social Security Administration's Employer W-2 Filing Instructions & Information webpage at www.socialsecurity.gov/employer. For information on filing information returns electronically with the IRS, see Publication 1220, Specifications for Filing Forms 1098, 1099, 5498, and W-2G Electronically, and Publication 1239, Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips Electronically.

By April 30, July 31, October 31, and January 31

Deposit FUTA taxes. Deposit federal unemployment (FUTA) tax due if it is more than $500.
File Form 941. File Form 941 and deposit any un-deposited income, social security, and Medicare taxes. You may pay these taxes with Form 941 if your total tax liability for the quarter is less than $2,500. If you timely deposited all taxes when due, you have 10 additional calendar days from the due dates above to file the return.

Before December 1

New Forms W-4. Remind employees to submit a new Form W-4 if their withholding allowances have changed or will change for the next year.

On December 31

Form W-5 expires. Form W-5, Earned Income Credit Advance Payment Certificate, expires each year on December 31. Eligible employees who want to receive advance payments of the earned income credit next year must give you a new Form W-5.

Hiring New Employees

Eligibility for employment

You must verify that each new employee is legally eligible to work in the United States. This will include completing the U.S. Citizenship and Immigration Services (USCIS) Form I-9, Employment Eligibility Verification. You can get the form from USCIS offices or by calling 1-800-870-3676.
New hire reporting. You are required to report any new employee to a designated state new hire registry. Many states accept a copy of Form W-4 with employer information added
Income tax withholding. Ask each new employee to complete the 2009 Form W-4. Or if they are independent contractors, have them fill out a W-9.

Name and social security number. Record each new employee's name and number from his or her social security card. Any employee without a social security card should apply for one.

Paying Wages, Pensions, or Annuities

Correcting Form 941 or Form 944. If you discover an error on a previously filed Form 941 or Form 944 after December 31, 2008, make the correction using new Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund, or Form 944-X, Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund. For errors discovered before January 1, 2009, taxpayers make corrections to Forms 941 and 944 using Form 941c that is filed with Form 941 or Form 944, or with Form 843 to claim a refund or abatement. Forms 941-X and 944-X are stand-alone forms, meaning taxpayers can file them when an error is discovered, rather than wait until the end of the quarter or year to file Form 941c with Form 941 or 944. Forms 941-X and 944-X are now used by employers to claim refunds or abatements of employment taxes, rather than Form 843.

Withhold federal income tax from each wage payment or supplemental unemployment compensation plan benefit payment according to the employee's Form W-4 and the correct withholding rate. If you have nonresident alien employees, see "Withholding income taxes on the wages of nonresident alien employees."

Withhold from periodic **pension and annuity payments** as if the recipient is married claiming three withholding allowances, unless he or she has provided Form W-4P, Withholding Certificate for Pension or Annuity Payments, either electing no withholding or giving a different number of allowances, marital status, or an additional amount to be withheld. Do not withhold on direct rollovers from qualified plans or governmental section 457(b) plans.

Zero wage return. If you have not filed a "final" Form 941 or Form 944 or are not a "seasonal" employer (see lines 16 and 17 of 2008 Form 941 (lines 18 and 19 of 2009 Form 941), you must continue to file a Form 941 or Form 944 even for periods during which you paid no wages. IRS encourages you to file your "Zero Wage" Forms 941 or 944 electronically.

Employer Responsibilities

Information Returns

You may be required to file information returns to report certain types of payments made during the year. For example, you must file Form 1099-MISC, Miscellaneous Income, to report payments of $600 or more to persons not treated as employees (for example, independent contractors) for services performed for your trade or business. For details about filing Forms 1099 and for information about required electronic filing, see the 2009 General Instructions for Forms 1099, 1098, 5498, and W-2G for general information and the separate, specific instructions for each information return that you file (for example, 2008 Instructions for Forms 1099-MISC). Do not use Forms 1099 to report wages and other compensation that you paid to employees; report these on Form W-2. See the Instructions for Forms W-2 and W-3 for details about filing Form W-2 and for information about required

electronic filing. If you file 250 or more Forms 1099, you must file them electronically. If you file 250 or more Forms W-2, you must file them electronically. SSA will not accept Forms W-2 and W-3 filed on magnetic media.

Insert Forms 1099-MISC (one-page total)

After December 1, 2008, you cannot file
Forms 1099 using magnetic media.

Annual Employment Tax Filing for Small Employers

Certain small employers may have to file Form 944 rather than Form 941 to report their employment taxes. For more information, see the Instructions for Form 944.

Non-payroll Income Tax Withholding

Non-payroll federal income tax withholding must be reported on Form 945, Annual Return of Withheld Federal Income Tax. Form 945 is an annual tax return and the return for 2008 is due February 2, 2009. Separate deposits are required for payroll (Form 941 or Form 944) and non-payroll (Form 945) withholding. Non-payroll items include:

- Pensions (including distributions from governmental section 457(b) plans), annuities, and IRAs.
- Military retirement.
- Gambling winnings.
- Native American gaming profits.
- Certain government payments subject to voluntary withholding.
- Payments subject to backup withholding.

For details on depositing and reporting non-payroll income tax withholding, see the Instructions for Form 945.

All income tax withholding reported on Forms 1099 or Form W-2G must also be reported on Form 945. All income tax withholding reported on Form W-2 must be reported on Form 941, Form 943, Form 944, or Schedule H (Form 1040).

Distributions from nonqualified pension plans and deferred compensation plans. Because distributions to participants from some nonqualified pension plans and deferred compensation plans (including section 457(b) plans of tax-exempt organizations) are treated as wages and are reported on Form W-2, income tax withheld must be reported on Form 941 or Form 944, not on Form 945. However, distributions from such plans to a beneficiary or estate of a deceased employee are not wages and are reported on Forms 1099-R; income tax withheld must be reported on Form 945.

Backup with-holding. You generally must withhold 28% of certain taxable payments if the payee fails to furnish you with his or her correct taxpayer identification number (TIN). This withholding is referred to as “backup withholding.”

Payments subject to backup withholding include interest, dividends, patronage dividends, rents, royalties, commissions, nonemployee compensation, and certain other payments that you make in the course of your trade or business. In addition, transactions by brokers and barter exchanges and certain payments made by fishing boat operators are subject to backup withholding.

Backup withholding does not apply to wages, pensions, annuities, IRAs (including simplified employee pension (SEP) and SIMPLE retirement plans), section 404(k) distributions from an employee stock ownership plan (ESOP), medical savings accounts, health savings accounts, long-term-care benefits, or real estate transactions. You can use Form W-9 to request that payees furnish a TIN and to certify that the number furnished is correct. You can also use Form W-9 or to get certifications from payees that they are not subject to backup withholding or that they are exempt from backup withholding. The Instructions for the Requester of Form W-9 (also available in Spanish) includes a list of types of payees who are exempt from backup withholding. For more information, see Publication 1281, Backup Withholding for Missing and Incorrect Name/TIN(s).

Recordkeeping

Keep all records of employment taxes for at least 4 years. These should be available for IRS review. Your records should include:

- Your employer identification number (EIN),
- Amounts and dates of all wage, annuity, and pension payments,
- Amounts of tips reported to you by your employees,
- Records of allocated tips,
- The fair market value of in-kind wages paid,
- Names, addresses, social security numbers, and occupations of employees and recipients,
- Any employee copies of Forms W-2 and W-2c that were returned to you as undeliverable,
- Dates of employment for each employee,
- Periods for which employees and recipients were paid while absent due to sickness or injury and the amount and weekly rate of payments you or third-party payers made to them,
- Copies of employees' and recipients' income tax withholding allowance certificates (Forms W-4, W-4P, W-4(SP), W-4S, and W-4V),
- Copies of employees' Earned Income Credit Advance Payment Certificates (Forms W-5 and W-5(SP)),
- Dates and amounts of tax deposits that you made and acknowledgment numbers for deposits made by EFTPS,
- Records of fringe benefits and expense reimbursements provided to your employees, including substantiation.

Change of Address

To notify the IRS of a new business mailing address or business location, file Form 8822, Change of Address. Do not mail Form 8822 with your employment tax return.

Chapter # 6 Recordkeeping

As an employer or as an independent contractor, the government requires you to keep records. Records of taxes, records of employees, etc. Below we will list most of the areas where the record keeping is mandated and necessary.

FLSA

Every employer covered by the Fair Labor Standards Act (FLSA) must keep certain records for each covered, nonexempt worker. Exempt employees are employees who, because of their positional duties and responsibilities and level of decision making authority, are exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). Exempt employees are expected, by most organizations, to work whatever hours are necessary to accomplish the goals and deliverables of their exempt position. Thus, exempt employees have more flexibility in their schedules as opposed to hourly employees. There is no required form for the records, but the records must include accurate information about the employee and data about the hours worked and the wages earned. The following is a listing of the basic records that an employer must maintain:

- Employee's full name, as used for social security purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records
- Address, including zip code
- Birth date, if younger than 19
- Sex and occupation
- Time and day of week when employee's workweek begins. Hours worked each day and total hours worked each workweek
- Basis on which employee's wages are paid
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

OSHA

Every employer covered by OSHA who has more than 10 employees, except for certain low-hazard industries such as retail, finance, insurance, **real estate**, and some service industries, must maintain OSHA-specified records of job-related injuries and illnesses. There are two such records, the OSHA Form 200 and the OSHA Form 101.

Federal Income Tax and Social Security and Medicare Taxes
You generally must withhold federal income tax from your employees' wages. You withhold part of Social Security and Medicare taxes from your employees' wages and you pay a matching amount yourself. To figure how much to withhold from each wage payment, use the employee's Form W-4 and the methods described in Employer's Tax Guide and Publication Employer's Supplemental Tax Guide. You must keep records of all payroll functions:

FMLA
The company will maintain records of family leaves in accordance with applicable law.

Labor & Industries
Each company must have posted the L&I poster Job Safety and Health Protection and a Certificate of Coverage and “Your Rights as a Worker in Washington State".

ERISA
ERISA requires detailed reporting and accountability to the federal government.
All employment forms; I-9, W-4, W-9, W-2 and 1099’s. Application, references, must be kept.
All paperwork regarding termination and discipline also.

Affirmative Action
Generally, those employers with federal contracts or subcontracts over $50,000 and 50 or more employees must have a written affirmative action plan. Plans for these employers must include:

• An equal employment opportunity policy for personnel actions
• Procedures for disseminating the policy
• Designation of an Affirmative Action Plan Coordinator
• An organizational profile
• A job group analysis
• Placement of incumbents in job groups
• Determination of availability
• Comparison of incumbency to availability
• Placement goals
• Designation of responsibility for implementation
• Identification of problem areas
• Action-oriented programs
• Periodic internal audits

Chapter # 7 Family and Medical Leave

Overview

Covered employers must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee
- for placement with the employee of a son or daughter for adoption or foster care
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; **or**
- to take medical leave when the employee is unable to work because of a serious health condition.

After a long delay, the U.S. Department of Labor (DOL) released final regulations revising the Family and Medical Leave Act (FMLA) effective January 16, 2009.

DOL made a very significant change in the final regulations. In trying to manage the intermittent leave under the law, employers got a break: DOL now says that leave can be granted in amounts that the employer uses for other types of leave rather than in the smallest increment that their timekeeping system can handle—but no more than an hour.

Other changes in employers' favor include (1) when an employee can't give 30 days advance notice of the need for leave, he or she should let the employer know the day he or she learns of the need, or the next day; (2) an employee who can't foresee the need must comply with the employer's usual and customary notice requirements and call-in procedures that apply to other absences; (3) the employee will need to explain, if asked, why the leave couldn't be foreseen; and (4) the new regulations add some guidance to the definition of a serious health condition, saying that an employee who is incapacitated for at least 3 consecutive days and sees a healthcare provider twice must make the visits within a 30-day period, with the first one occurring within 7 days of the initial incapacity. And "periodic" doctor visits for a chronic condition are defined as at least two per year.

If an employee can't resume his or her former job immediately on return and is given "light duty" for a period, the time spent in that duty is not counted against FMLA leave. And, the employee is entitled to restoration of the former job when light duty is no longer needed. This is an important change, because some courts, in the past have counted light duty against the employee's leave allotment.

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Important Points

- Compliance with applicable statutes: ensure that your policy meets the standards of the revised law, both federal and state. The FMLA applies to employers with 50 or more employees.
- To comply with sex discrimination laws, employers with a medical leave policy are required to include a pregnancy leave policy. Some states, such as California, provide for a specific pregnancy leave.

- Duration of leave: identify the duration of family leave, which may depend upon applicable law. For example, under the FMLA, most eligible employees are entitled to up to 12 weeks of unpaid leave per 12 months. However, eligible employees who care for a member of the armed services with a service-connected serious injury or illness can qualify for leave of up to 26 weeks of unpaid leave in one 12-month period. The maximum leave in any 12-month period is 26 weeks (service member caregiver leaves plus any other FMLA-qualifying leave). If there is no law, establish a duration that will be the least disruptive to your business and at the same time discourage further government action. Please note that if the FMLA applies to your organization, you can normally require the employee to first use paid personal or sick leave for any part of the 12-week or 26-week period.

- Purpose of leave: define the purposes for which you will permit family leave. Will it be only for the birth, adoption, or an illness of a child? Will you include such reasons as serious illness of a parent, a spouse, child, or a sibling? Caring for an injured service member? Under the FMLA, a covered employer may be required to grant such leave. Please note that the definition of the purpose may vary under applicable law, e.g., under the FMLA the definition for a “serious health condition” is different than a “serious illness or injury” for a member of the armed services. The FMLA includes leave for qualifying exigencies arising from the fact that a spouse, child, or parent is on active duty. Some states (e.g., California, Indiana, Illinois, Maine, Minnesota, Nebraska, and New York) require family leave to visit or care for a member of the uniformed services.

- Holidays and sick days: integrate your family leave policy with your holiday and sick leave policies. Employees often use personal sick time to care for ill children. Rather than encouraging employees to engage in a subterfuge, you may want to acknowledge this factor and provide for it.

- Vacation: coordinate your vacation policy with your family leave policy. For example, can an employee take a 2-week paid vacation and then add to it 12 weeks or 26 weeks of unpaid family leave under the FMLA? You may also want to require coordination of vacations within a department. For example, to avoid hiring a temporary replacement, you could reduce the amount of vacations taken within a department during the family leave of one employee. As noted, under the FMLA, employers can require employees to first use paid vacation for any part of the 12-week or 26-week period.

- Integration with other policies: integrate this policy with other policies, such as nepotism. For example, if married couples work for you, consider the impact of a leave policy that permits time off to care for an ill spouse. Consider a limit on the total leave that an employee may take, whether it is medical, family, educational, personal, or the like. Exercise care when placing a limit on the total leave by following applicable leave laws (e.g., California requires a 4-month leave for maternity purposes and 4 months under its family leave provision, and the FMLA allows up to 26 weeks to care for an injured service member) as well as the reasonable accommodation provisions of disability laws, which may require you to exceed such a limit.

- Management involvement in allowing leaves: consider having two levels of management approve leaves. One level of management can be your Human Resources department. By requiring two persons to be involved, you can reduce the risk that employees claim that they were treated inconsistently or that they were being discriminated against. By involving your Human Resources department, you can increase consistency.

- Eligibility: some statutes provide that employees have to be employed for a certain time before they are eligible for family leave. You may want to do the same. You may want to limit eligibility for family leaves to full-time employees rather than part-time employees. Federal or state law may set a standard for eligibility, e.g., the FMLA sets a standard of 12 months of employment and 1,250 hours worked in the last 12 months. Further, you may want to require proof of the particular incident, such as a doctor's certificate that a child is truly ill.

- Accrual of benefits during the leave of absence: again, your policy will need to comply with applicable law. Under the FMLA, an employee maintains his or her seniority and any benefits accrued prior to that date except to the extent that the employee may be required to use paid personal, sick, or vacation time as part of the 12-week or 26-week leave. In addition to compliance with the FMLA, consider whether there is any potential violation of the ADA if you affect the accrual of benefits during a leave of absence which is provided as a reasonable accommodation under the ADA.

  In the absence of a legal standard, consider whether you will provide pay during the leave of absence, whether you will allow accrual of vacation to continue during the leave, and whether the employee will continue to be eligible to participate in such benefits as your group medical plan. If you should determine that your employees are not eligible to continue in your group medical plan because they are on a family leave, you will then need to integrate that policy into compliance with the Consolidated Omnibus Budget Reconciliation Act (COBRA), which requires the employer to allow an employee to continue group medical coverage under certain circumstances.

- Notice of the need for the leave: establish how much notice the employee is to provide to you to take family leave. In the case of a pregnancy, that may be a longer time than in the case of the sudden, severe illness of a child. The FMLA requires employees to give 30 days notice for leave taken for the birth or adoption of a child. If such notice is not practicable, the employee may be required to comply with the employer's usual and customary notice procedures. Further, for leave based on planned medical treatment, employees are requested to schedule the treatment to avoid unduly disrupting the operations of the employer.

- Ability to work part time during a leave: depending on your working hours, you may find it possible that a parent on leave that is tending to an ill child may be able to work a limited number of hours. State whether you will permit part-time work during a leave. Please note that the FMLA does not allow employers to require an employee to return to work part time or to work in a restricted duty position.

- Restricted duty: in addition to part-time work, an employee may be able to perform restricted duty during a family leave. “Restricted duty” should be defined. Have specific job descriptions so that you can determine which duties the employee can and cannot perform, and then determine if the duties that the employee can perform are sufficient to justify if the employee should work. Exercise caution to ensure that you are consistent to avoid discrimination claims.

- Intermittent leave: the FMLA provides for leave on an intermittent basis—taking random days for leave or an hour or two on particular days. Using intermittent leave for a serious health condition, either the employee’s or a family member’s may be taken only when medically necessary. In addition, using intermittent leave for care of an injured or ill Service member, may be taken only if medically necessary. Keep in mind the limits created by the ADA with respect to acquiring medical information. Additionally, intermittent leave taken for the birth or adoption of a child is available only if the employer and the employee agree to the arrangement.

- Transfers: state whether employees on family leave may be transferred. For example, if the family leave is intermittent, another position may better accommodate the intermittent leave. Applicable law may require equivalent pay and benefits in the alternative position.

- Reinstatement: state whether the employee is guaranteed the exact job position or a comparable position upon return from leave. Under the FMLA and some state laws, upon returning to work, an employee is normally entitled to be restored to the same position or an equivalent one with equivalent employment benefits, pay, and other terms and conditions of employment. Identify when reinstatement is not possible. For instance, the employee is not eligible if the job has been eliminated and the employee is not qualified for any other job. If you will give the employee a preference over other applicants for the next available job, include that statement in your policy. Coordinate your re-employment criteria with your policy on the duration of the leave. If the employee does not return in the specified time, what effect does that have on reinstatement?

- Employees not eligible to reinstatement: under the FMLA, an employer is not required to restore “key” employees—an employee who is one of the highest-paid 10 percent of the employer’s workforce—if returning the employee causes substantial and grievous economic injury to the business. However, if the employer decides not to restore the employee, the employee must be notified of this decision and, if the leave has already begun, he or she must have the option of returning to work after learning of the employer’s decision. If the FMLA does not apply, you may still wish to identify “key employees” for whom family leave may not be available, may be limited in some fashion, or for whom you may not guarantee return to the same position.

- Termination: State the firm’s policy when an employee fails to return from leave on the specified date. Will you call the employee to find out what happened? Will you simply terminate the employee? If the employee is terminated, does COBRA apply?

- Extensions: if an employee wants to extend the date of return, who has the authority to do so; how many times will an extension be granted; what documentation is required to gain an extension, and will benefits accrue during this extension?
- Group health coverage: under the FMLA, an employer must maintain any group health plan for the duration of the leave at the level and under the conditions that coverage would have been offered had no leave had been taken. Your policy can provide, under this statute, that if the employee fails to return to work at the end of the leave you may recoup the employer's portion of the cost of maintaining the health coverage, under limited circumstances. However, the employer may not recover such healthcare costs when the failure to return is due to a continuation or recurrence of a serious health condition, which includes the serious injury or illness of a service member.
- Posted notices: the FMLA requires employers to post a notice summarizing this law. Some states have similar requirements. State that you will post all notices required by applicable law.
- Records: state that the company will maintain records of family leaves in accordance with applicable law.

Insert form Notice of eligibility and Rights FMLA (2 pages total)

Legal Points

- The FMLA requires certain employers to permit leaves for the birth or adoption of a child; to care for a seriously ill member of the employee's immediate family, such as a parent, child or spouse; to care for a covered service member who is the parent, child, spouse, or next of kin of the employee; for the employee's own serious illness; or to handle qualifying exigencies that arise due to the active duty or call to active duty service of a spouse, child, or parent.
- FMLA eligibility: under FMLA, an eligible employee is one who has been employed for at least 12 months and has worked at least 1,250 hours during that period.
- FMLA certification: the FMLA permits the employer to require certification of the fact that the employed is unable to work due to a serious health condition, certification of the fact that the employee is needed to care for a family member or a member of the military, or certification that a family member in the National Guard or reserves has been called to active duty.

- FMLA health coverage: Under the FMLA, an employer must maintain any group health plan for the duration of the leave at the level and under the conditions that the coverage would have been offered if no leave had been taken.
- FMLA emergencies leave: under the FMLA, eligible employees may take leave due to qualifying emergencies arising out of the fact a spouse, child, or parent is on active duty in the military in support of a contingency operation.
- FMLA 26-week leave. Under the FMLA, eligible employees who are the spouse, child, parent, or next of kin of a covered service member are entitled to leave of 26 weeks during a single 12-month period to care for certain service members.
- FMLA next of kin: Under the FMLA, next of kin can be eligible for the one-time 26-week leave to care for a covered service member.
- FMLA covered service member: Under the FMLA, a covered service member means a member of the armed forces, including the National Guard or reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.
- FMLA serious injury or illness: The definition of a “serious injury or illness” under the FMLA is different for a member of the military than it is for the employee or a spouse, child, or parent. For a member of the military, the definition is “an injury or illness incurred by the member in line of duty on active duty in the armed forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”
- FMLA combination leave: during any single 12-month period, even if the employee qualifies for family and medical leave and service member caregiver leave, the maximum leave time is 26 weeks.
- FMLA confidentiality: the FMLA imposes a confidentiality obligation on employers.
- Regulations: be alert for changes in the regulations concerning FMLA.
- Americans with Disabilities Act: the ADA restricts medical inquiries of employers and imposes confidentiality requirements. The ADA also prohibits discrimination against an individual who cares for a disabled person. Thus, if one of your employees is a parent with a disabled child, he or she may be entitled to a reasonable accommodation, under the ADA, that exceeds your family leave policy.
- State law: state law may require family leave.
- Law most favorable to employee: if state law is more generous than FMLA, the state law applies to a specific employee or vice versa. Employers with facilities in more than one state may want to adopt a policy that meets the minimum requirements of the federal

law and laws in each state so that it can be consistent and ease the administration of such a policy. Because these laws are sometimes revised, employers should consult with counsel to review applicable law in their states.

Considerations

1. Standard or varying policy. If you do business in several states with differing rights for family leave you may want to maintain a consistent policy in all of your facilities by following the law with the most generous provisions for the employees rather than vary your policy based on applicable law. The ease of administration may outweigh any excess benefits paid. You may also avoid any morale problems caused by differing policies.

2. Communication with employees. Depending on your policy and size, you may want to tell applicants what your policy is concerning family leave. Be careful to avoid violating any discrimination law. For example, you cannot tell only female applicants what your family leave policy is, you also must tell male applicants.

3. Continuation of medical coverage. Consider whether some or all leaves are events which qualify an employee for continuation of group medical coverage under COBRA.

4. Training. By cross-training employees, you may avoid problems that arise because of family leave. Cross-training means you have someone else who can do the task while one employee is on leave and when the employee returns you have several suitable positions available rather than one.

5. Overtime. Consider integrating your leave policy with your overtime policy. You could use other employees on overtime hours rather than hiring a replacement to fill the job made vacant because of a leave.

6. Reinstatement. If you have many employees who perform the same task, it may be very easy to offer re-employment after a significantly long period of time. Given turnover, you will be able to hire a replacement for the employee on leave and then still anticipate that there will be a position available for the returning employee. On the other hand, if the employee performs a unique function, you may need to hire a temporary replacement in order to get the work done and to be able to reinstate the employee on leave.

Under these circumstances, consider allowing flexible hours, intermittent leave, work at home, your own temporary service, light duty, or part-time work so that you can avoid the need for hiring a temporary replacement. Because of the difficulties that small employers will face, many of the laws enacted provide an exception for smaller workforces.

7. Flexible hours. Allowing flexible hours may offset some problems that arise from family leave. To illustrate, if both parents work 9 to 5, one will stay home to take care of the child too ill to send to daycare or school. On the other hand, if your business permits employees to work on the evening or the weekends, those same two parents may be able to juggle their schedules so that both get a day’s work done, and you may be able to reduce the amount of family leave that is needed.

8. Work at home. Allowing employees to work at home for short periods may reduce problems due to family leave. Naturally, in a manufacturing plant, the widget maker can do

very little at home. However, there may be other duties the employee can perform at home over a short period of time. Moreover, there are positions, such as computer programmers, which may lend themselves to working at home.

9. Past experience with other types of leave. When designing your family leave policy, review the experience you have had with other types of leave. Have employees used personal leave as a type of family leave? Has that been a satisfactory policy? Can you simply adopt it and call it your family leave policy? On the other hand, have your employees always used all of the “sick days” even though you knew they were really not ill?

10. Floaters. Rather than obtaining outside temporary replacements, consider a “floater.” This person is crossed-trained in many positions and is able to fill in when an employee is absent for 1 day or for an extended amount of time. To illustrate, if you have 20 individuals who take phone orders, you may learn that you should have 21 because you always have one person out ill, on leave, on vacation, or absent for some other reason.

11. Your own temporary service. Rather than going through a commercial temporary service that may be expensive, consider creating your own. As an example, your retired employees may be a pool from which you can draw temporary workers. If you have part-time employees, their hours may be expanded to cover hours otherwise worked by an employee on family leave.

12. Child care or elder care. Consider using child care or elder care as solutions to family leave. Offering an on-site sick-child care center could reduce the days missed by employees to take care of an ill child. Similarly, an elder daycare center may reduce the time off to care for ill parents. A detailed discussion of these benefits is contained elsewhere in this publication.

13. Unemployment benefits. Consider whether employees on an unpaid family leave can qualify for unemployment benefits. Determine whether the cost of these unemployment benefits is charged back to your unemployment account. If your employees who are on unpaid family leave are eligible for unemployment benefits that are charged back to your individual account, consider developing flexible-hour policies, work-at-home policies, and restricted-duty policies to reduce the cost of these unemployment charges.

The essence of all of these considerations is that you must be imaginative in responding to the growing demand for family leaves. Your workforce, job assignments, and productivity requirements will dictate the solutions you create. Naturally, federal and state law will apply.

Chapter # 8 Discipline and Termination

Discipline

Almost every policy manual has a section covering disciplinary procedures and work rules. Policies in this area, in fact, are usually widely distributed and publicized, not only in the policy manual itself, but also in management memoranda, intranet and bulletin board postings, e-mail, newsletters, training and refresher training, orientation sessions, etc. Most companies want to make sure that neither their supervisors nor their employees are in

doubt when it comes to complying with these rules, and thus they promote them at every available opportunity.

We will discuss comprehensive policies on “work rules” first and then policies on “disciplinary procedures.” No matter what approach your company decides to take, the goal should be twofold: first, to specify the activities, practices, or forms of behavior that are expressly forbidden; and second, to spell out exactly what steps will be taken when work rules are violated.

As employers design their work rules, there are legal issues to be considered.

How an employer can prove an employee knew about a work rule:

- By a signed acknowledgment
- By a receipt for the employee handbook
- By attendance sheets at orientation
- By a combination of these forms

Points to Cover

The following list summarizes the areas in which most companies have established work rules. It is not meant to be all-inclusive, but merely to reflect widespread practices. You may want to sit down with your policy committee and discuss the pros and cons of including (or deleting) some of these items from your existing statements on work rules.

• **Recording time worked.** It is usually forbidden for employees to punch in or out for each other.

• **Unreported absences.** If an employee is absent for 3 consecutive days without reporting in, it is customary to take disciplinary action. This topic may also relate to your job abandonment policy.

• **Leaving early.** If an employee leaves early without authorization, normally some disciplinary action is taken. Again, this topic may relate to your job abandonment policy.

• **Excessive tardiness.** Disciplinary action kicks in after an employees’ tardiness becomes excessive (? times).

• **Theft of company or personal property.**

• **Damaging or defacing company property.**

• **Alcohol or drug abuse.** This usually includes possession of these substances on work premises and being under the influence of alcohol or drugs during working hours.

• **Gambling.**

• **Fighting, wrestling, or roughhousing on company property.**

• **Insubordination.**

• **Sexual harassment or harassment.** Employers may combine this topic with profane or obscene language. Usually, this topic forbids viewing pornography online or possessing pornographic material, telling obscene jokes, making offensive comments about appearance, offensive grabbing, racist slurs, and the like.

• **Offensive or disruptive apparel/items.** Again, this issue may be combined with profanity, obscenity, discrimination, etc. Normally, this rule forbids offensive T-shirts, gang regalia, rebel flags, graphic pictures of aborted fetuses.

• **Unlawful discrimination.** Unlawful discrimination can include harassment, race discrimination, age discrimination, pregnancy discrimination, disability discrimination, and other forms of discrimination. Employers may want to use this item as an overall policy and then emphasize subsets of discrimination, such as harassment.

• **Failure to cooperate with an investigation.** This work rule may stand alone or may be part of an unlawful discrimination policy.

• **Lying to management or by falsifying company records or reports.**

• **Loitering or deliberately taking more time than it should to complete a job assignment.**

• **Sleeping on the job.**

• **Conducting personal business (by telephone or online) during working hours or receiving personal visitors.**

• **Violation of safety or fire-prevention rules.**

• **Violation of smoking policies or local ordinances.**

• **Failure or refusal to wear protective equipment.**

• **Possession of a dangerous weapon on company premises.**

• **Contraband.** Contraband can include weapons, licensed hand guns, drug paraphernalia, and pornographic material. It may be a separate item, or it may be included within another category.

• **Appearance.** If employees have contact with the public and you want to avoid “extreme dress,” you may want to include appearance in your work rules. For example, you may want to ban the wearing of nose, tongue, or eyebrow rings while at work or require that females do not wear clothing that exposes their midriffs.

• **Eating in certain restricted areas.**

• **Unauthorized use of company tools or equipment.**

• **Disclosure of confidential information.**

• **Conflict of interest.** This issue may need to be explained. For example, it may be OK for a cook at a restaurant to take a second job as a cook at restaurant five miles away but not acceptable for a manager to do so.

• **Solicitation.** This is usually covered in a separate policy statement but can be included here.

• **Link to policy on discipline.** You may want to refer your readers to your policy on disciplinary procedures in connection with work-rule violations.

Legal Points

• **Discrimination.** To cover your company when it is accused of unlawful discrimination, you may want to include in your work rules a ban on unlawful discrimination and provide for discipline if an employee fails or refuses to cooperate with any investigation of unlawful discrimination.

• **Privacy.** As you draft your work rules, you should consider whether there is any potential for invading the privacy of the employee. For example, a ban of smoking in the workplace may be lawful but telling employees they cannot smoke off the job may be unlawful in certain states. If you are a public employer, there may be a limit on what you can address in your work rules. For example, one court said it was wrong for the fire department to tell a firefighter he could not read Playboy when off duty, but still at the firehouse.

• **Solicitation.** The rules governing solicitation should be regularly reviewed, as the courts and the National Labor Relations Board at times have changed their interpretation of the words to use to describe this policy.

• **Employment at will.** Care should be taken that your work rules and disciplinary policy do not create a contract if you want to maintain an employment-at-will relationship.

• **Disputes.** Some employers are now adopting arbitration as a mechanism for resolving disputes with employees. If you decide to implement an arbitration policy, you will need to decide whether all work rule disputes, or just some, are to be settled by arbitration. For example, you might want to use arbitration only for violations of work rules that lead to discharge, rather than for a violation that leads to a demotion or the delay of a pay increase.

• **Licensed handguns.** Determine whether your state law permits you to ban licensed handguns from the workplace and/or parking lots. You also need to consider the liability if you do not ban licensed guns and the liability if you do ban licensed guns.

• **Confidential information.** You should consider whether you need to define confidential information in your policy. You should also make certain that the company has taken practical steps to safeguard confidential information (e.g., store in locked file cabinets, label as confidential, restrict access, etc.).

• **Changes.** When you make a change in your work rules, take practical steps to ensure you can prove employees knew of the rule change before you discipline an employee for violating it. Further, determine whether your state requires an employer to make changes in a certain manner in order to enforce them, e.g., a written notice to employees of the change coupled with the statement that the employee has accepted the change if he or she continues to work after the rule goes into effect.

• **Legal Review.** Set up a routine legal review of your company's work rules and other policies, even if you are not changing them, and obtain legal advice before implementing a new rule. Remember, points here are a starting place for your discussion, are not legal advice, and are not to be used as a substitute for advice from an attorney. Federal, state, and local laws change, and courts and other government bodies change their interpretations of them.

Things to Consider

There is really very little variation in work-rule policies, the main difference being the number of rules covered by the policy. However, you will probably want to raise the following issues in your discussions with policy committee members:

1. Existing memoranda, policy statements, etc., referring to work rules. Whether you are establishing a policy in this area for the first time or revamping an existing policy, you'll want to make sure you do not overlook anything. The best way to do this is to gather all relevant memoranda, intranet and bulletin board postings, etc., and review the forbidden activities or practices covered by them.

2. How comprehensive you want your policy to be. Some companies prefer to concentrate on really serious infractions, especially those that could result in discharge. Others try to cover every possible rule that might be broken, just so that supervisors don't let infractions go unnoticed or unpunished. You'll have to decide just how comprehensive and detailed you want your policy to be in this area.

3. Relevant union contract provisions. Proper standards of conduct and required disciplinary procedures are usually covered by the union contract. If unions are present in your organization, you might want to include their representatives in your policy formulation sessions, or at least review the relevant portions of the applicable contracts before putting your policy in writing. Another approach is to include these portions of the contract(s) as an appendix to this section of your policy manual.

4. Room for flexibility. It may well be that a year or two from now, you will want to add new work rules to your policy. It may also be that an unusual occurrence will alert you to the fact that not every possible situation requiring discipline can be foreseen and covered by your policy.

It's important, therefore, to leave some room in your policy for supervisory discretion and judgment. Changes in working conditions or facilities may even make it desirable to drop one or two of your rules. Just remember that you should not approach policy-writing in this area as the "last word" on every possible situation requiring disciplinary action.

. The “strict” policy, for example, is organized based on the seriousness of the charge. The “standard” policy, which reflects what is, probably the most common approach, simply lists the relevant work rules and states that the appropriate disciplinary action will depend on the seriousness of the offense. The “progressive” policy, which also contains a list of relevant work rules, is noteworthy for two reasons: first, it starts with a true policy statement (which, unfortunately, is fairly rare when it comes to work rules); and, second, it includes a statement at the end to the effect that both the company and the supervisor reserve the right to establish additional rules when the situation warrants.

Exit interviews

A well-thought out exit interview can help an employer avert serious lawsuits; gather critical feedback about salaries, morale, and management practices; determine the causes of turnover; gain information required by law and take care of necessary administrative actions in a half hour or less.

Information gleaned from well-structured exit interviews can provide a helpful gauge to the effectiveness of human resources policies and management practices. Turnover can be reduced, hiring procedures modified, managing techniques improved, and, in time, employee morale and satisfaction improved.

Exit interviews are normally held with employees who have decided to terminate their employment or who have been discharged whether for cause or as part of a reduction in force. The purpose is to give them an opportunity to express any residual feelings—positive or negative—that they may have about the decision and to offer their suggestions for how the job or the work environment might be improved.

Some companies draw a distinction between exit interviews (for employees who have terminated voluntarily) and termination interviews (for employees who have been dismissed). From the interviewer’s point of view, the two experiences can be quite different.

In a voluntary situation, a properly conducted interview and signed statement confirms the departing employee’s reason for leaving in a formal record, so that he or she cannot later allege some form of discrimination.

However, when an employee has been discharged, the interview may help avoid costly legal action by a disgruntled employee. In some cases, simply providing the employee with an opportunity to talk about work issues with a professional, concerned interviewer may be enough to vent negative feelings and thwart the desire to file a lawsuit.

Interview Questions

A properly handled exit interview gives the employee a chance to think about the job as a whole—rather than just the reasons for the termination—and may provide the HR department with some valuable information about job dissatisfactions caused by the company’s policies, practices, and personnel, which can be used to prevent similar situations from recurring.

It’s obvious that the circumstances surrounding the termination may color the employee’s answers to some of these questions, especially if the decision to leave was not voluntary.

However, skillful handling of the interview itself can still yield some valuable information, create goodwill between the employee and the employer, and have the employee leave with a good feeling about the company.

Summarized below are guidelines for termination interviews:

• Ask yourself the following questions:

—Have we warned the employee (i.e., will the employee be surprised)?

Insert Disciplinary Action Form (one-page total)

—Have we trained the employee properly?

—Have we followed our policies?

—Have we tried to obtain all of the relevant facts?

If any of the answers are “No,” then rethink the decision to discharge.

• Consider the timing and the location of the meeting. Avoid a Friday termination. Firing an employee on Tuesday gives the individual time to call you to ask follow-up questions, to apply for unemployment, and to start the search for a new job. • Avoid a “public” termination.

• Clearly explain the reasons for the dismissal; keep in mind that if you sugar coat the reason, the employee may believe that he or she is really being fired for an unlawful reason and be provoked into filing a claim; skip casual conversation and any sarcasm during the meeting; avoid inflammatory remarks. (For example, do not call an employee a thief but, instead, state you have reason to believe the employee altered the credit card voucher without authority, and ask for an explanation.)

• Never give an untrue reason for the decision to discharge.

• Allow the employee to express his or her feelings and frustrations; you might gain valuable insight into your operation.

• Avoid disagreements and stick to the point.

• Keep control of the situation.

• Make sure the employee knows the decision is final and nonnegotiable.

• Have a witness to interviews for involuntary terminations. At times, it may be proper to have a witness who is the same sex, age, etc., as the employee.

• Avoid discriminatory or patronizing remarks.

• Keep the termination interview relatively short.

• Complete all termination forms and list all the reasons for the termination. This documentation could be used if a future lawsuit was to occur.

Points to Cover

Some companies simply attach a copy of the exit interview form to their general policy on terminations (perhaps a "standard" policy). However, if your company intends to have a separate policy statement on exit interviews, here are the points to cover:

• **Purpose.** As clearly as possible, state what you see as the purpose for exit interviews. It may be to discover the real reasons for the employee's decision to leave, or to get the employee to reconsider his or her decision. For employees who are being discharged, you may want to learn whether the problem was poor hiring, poor placement, poor training, or poor supervision.

• **Who gets interviewed?** All voluntary quits should be interviewed. Involuntary terminations may be interviewed on a case-by-case basis as it may not be practical or necessary to conduct interviews in cases of major layoffs or terminations for serious misconduct.

• **Interviewer.** The immediate supervisor is normally advised of the notice, resignation, or intention to terminate and will informally talk to the person who is leaving. However, for a formal exit interview, a person who is perceived as neutral or detached by the departing employee is best. This is usually someone from human resources or upper management. This should also elicit more candid remarks from the employee than if someone who was involved in their direct supervision is involved.

During mass layoffs, the services of a termination consultant to conduct the interviews may be useful.

• **When the interview is held.** Most exit interviews are scheduled as close to the time of the employee's actual departure as possible. However, if the termination is voluntary, it may be held a day or two in advance. In voluntary terminations, do not hold the interview at the end of the last day; give the employee time to say goodbyes.

• **Interview format.** If you want to, you can outline the approach you want the interviewer to take and the points you want covered. Some companies include tips for interviewers on how to avoid defensiveness, how to encourage employees to give honest and specific information, how to remain objective when the employee criticizes the firm or his supervisor, etc.

• **Interview form or questionnaire.** It is common to have either the interviewer or the departing employee (or in some cases, both) fill out an exit interview form. Sometimes the form simply replaces the interview itself, although obviously this won't elicit the same kind of information as a face-to-face discussion. If your company uses such a form, you can attach it to your policy statement.

• **Written material.** The exit interview is a good time to give any written material to the departing employee.

• **Interview security.** Take steps to ensure confidentiality: Have a predetermined plan if there is a chance that the employee will become violent. During mass layoffs, the local police department should be notified.

• **Layoffs.** What help is offered to employees who are laid off? Do you provide the location of the unemployment office? Do you offer to alert other local employers of the availability of the worker? Do you offer training in applying and interviewing for a new job? Do you offer severance pay?

Legal Points

• **Reason for involuntary termination.** Determine if your state law requires you to tell an employee why he or she is being fired.

• **Defamation.** Do not accuse the employee of wrongdoing if you cannot prove.

• **Privacy.** Maintain the information provided by the employee in confidence. Only tell others who have a need to know the information provided by the employee.

• **Trade secrets and confidential information.** The interview is a good opportunity to remind the departing employee of the obligation under any non-compete, non-solicitation, and nondisclosure agreements they have signed, as well as the penalties for breaking such agreements.

• **Investigation.** If the employee reveals new information as to the reason for quitting, such as unlawful discrimination (e.g., sexual harassment), tell the person that the new information will be investigated and reported back to him or her. Ask if the person would like to delay the termination until the end of the investigation.

• **Notice of rights.** Provide the employee with all the information required by law (COBRA rights, date of last paycheck, deductions from paychecks, etc.).

• **Benefits information.** You can get and give information on the transition of benefits at this time by explaining the parameters of insurance coverage and making sure that HR has any new address information or names and addresses of beneficiaries.

• **Workers' compensation fraud.** The exit interview is an excellent place to prevent illegitimate workers' compensation claims. At the end of the meeting, the employee can be asked to sign and date a statement that says the employee has reported all workplace-related injuries. Such documentation will be useful if the person later files a claim.

Things to Consider

• **Employment Practices Liability Insurance (EPLI).** An employers' use of formal exit interviews may affect the cost of EPLI. Factors such as exit interviews, formal orientations, and signed handbooks may be taken into consideration by insurers when assessing risk.

• **Training for interviewers.** Many companies train the individuals who regularly conduct exit interviews in how to handle what is often a highly charged situation.

• **Past experience with exit interviews.** If exit interviews in the past have turned into explosive and counterproductive arguments, or if employees have often been too hesitant to reveal their true feelings about terminating, perhaps it's time to revamp your policy and give interviewers more guidance on how to handle such reactions. If interviewers feel that much is learned, but little is done, with the information that comes out of the exit interview, then this too should be remedied.

• **Sensitivity to equal employment opportunity (EEO).** The exit interview often reveals that discrimination—or at least the possibility of discrimination—has played a role in the decision to terminate an employee or in the employee's decision to leave. It is common for supervisors to base a termination on pretext. For example, if in talking to a female employee during the exit interview, the interviewer discovers that she has regularly received satisfactory performance reviews from her supervisor, and that the only unsatisfactory rating came after she filed a sex discrimination complaint. Top management and counsel should be alerted immediately to the possibility of a discrimination suit based on retaliation for filing a complaint.

• **Follow-up.** If the exit interview indicates your company discriminated against or unjustly dismissed an employee, you should take action to reduce your liability. Immediately notify top management and your employment attorney. Remember, you may be *personally liable* for discrimination and unjust dismissal.

Chapter # 9 Fair Labor Standards Act LSA)

What does the Fair Labor Standards Act require?

The Fair Labor Standards Act's (FLSA) basic requirements are:

- Payment of the minimum wage
- Overtime pay for time worked over 40 hours in a workweek
- Restrictions on the employment of children
- Recordkeeping.

The FLSA has been amended on many occasions since 1938. Currently, workers covered by the FLSA are entitled to the minimum wage and overtime pay at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek. Various minimum wage exceptions apply under specific circumstances to workers with disabilities, full-time students, youth under age 20 in their first 90 days of employment, tipped employees and student-learners. Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off (instead of cash overtime pay). Employers are required to keep records on wages, hours, and other items which are generally maintained as an ordinary business practice.

The FLSA child labor provisions are designed to protect the educational opportunities of youth and prohibit their employment in jobs and under conditions detrimental to their health or safety. The child labor provisions include some restrictions on hours of work for youth under 16 years of age and lists of hazardous occupations too dangerous for young workers to perform.

Wages required by the FLSA are due on the regular payday for the pay period covered. Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade, are not legal if they reduce the wages of employees below the minimum wage or reduce the amount of overtime pay due under the FLSA.

In order for the FLSA to apply, there must be an employment relationship between an "employer" and an "employee." The FLSA also contains some exemptions from these basic rules. Some apply to specific types of businesses and others to specific kinds of work.

What does the Fair Labor Standards Act NOT require?

There are a number of employment practices which the FLSA does not regulate. For example, the FLSA does not require**:**

(1) vacation, holiday, severance, or sick pay
(2) meal or rest periods, holidays off, or vacations
(3) premium pay for weekend or holiday work
(4) pay raises or fringe benefits
(5) a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
(6) pay stubs or "W-2"s.

The FLSA does not provide wage payment or collection procedures for an employee's usual or promised wages or for commissions in excess of those required by the FLSA. Also, the FLSA does not limit the number of hours in a day, or days in a week, an employee may be required or scheduled to work, including overtime hours, if the employee is at least 16 years old. However, some states do have laws covering some of these issues, such as meal or rest periods, or discharge notices.

The above matters, which are not covered by the FLSA, are generally for agreement between the employer and the employees or their authorized representatives.

Am I Covered by the FLSA?

The FLSA "covers" or applies to all employees of certain "enterprises." All employees of an enterprise, as defined by the FLSA, are covered regardless of the duties they perform. If a worker is not an employee of one of these enterprises, he or she may still be covered if the employee's own duties meet certain interstate commerce requirements.

You may not be covered by FLSA if you work for any of the following enterprises:

- A Federal, state, or local government agency

- A hospital, or an institution primarily engaged in the care of the sick, the aged, or the mentally ill or mentally retarded who live on the premises (it does not matter if the hospital or institution is public or private or is operated for profit or not-for-profit)
- A pre-school; elementary or secondary school or institution of higher learning (e.g., college); or a school for mentally or physically handicapped or gifted children (it does not matter if the school or institution is public or private or operated for profit or not-for-profit)
- A company/organization with annual dollar volume of sales or receipts in the amount of $500,000 or more

Then the Fair Labor Standards Act probably does not apply to you or cover you on an enterprise basis. However, you may be individually covered by the FLSA if your own duties meet certain requirements.

You should be aware, however, that you may be covered on an enterprise basis if the grandfather coverage provisions of the FLSA's 1989 amendments apply to your employer. When the law was changed in 1990, the definition of a covered enterprise changed. Enterprises that were covered by the FLSA's 1989 Amendments on March 31, 1990 continue to be subject to the recordkeeping, overtime pay and the child labor requirements, and the $3.35 per hour minimum wage requirement ($3.35 was the minimum wage in effect on 3/31/90). This is called grandfather coverage. Included in grandfather coverage are construction/reconstruction enterprises and laundry/dry cleaning enterprises. Certain other enterprises with less than $500,000 in annual sales or receipts are also covered under the grandfather coverage provisions.

If you are certain grandfather coverage applies and you are not concerned about the FLSA minimum wage requirement (because your rate of pay is already at or above the federal minimum wage), you may want to ask the FLSA, to obtain more information about the law.

Insert FLSA Forms (one-page total)

Individual Coverage

Individual coverage depends on the nature of your work. An employee is covered on an individual including any **closely related process or occupation directly essential to such production.** The terms in bold basis in every workweek in which he or she performs any work constituting **engagement in interstate or foreign commerce,** or the **production of goods for interstate or foreign commerce**, will be defined later in this section.

The workweek is the standard to be used in determining if the FLSA applies. An employee may be individually covered in one workweek and not covered in the following workweek. Also, some employees of an employer may be individually covered by the FLSA, and others not.

Section 12 of the FLSA covers youth employed in or about an establishment in which goods are produced for commerce. Under this provision, the youth does not have to be personally engaged in the production of goods for interstate commerce to be protected by the child labor provisions of the FLSA. As long as somewhere in or about the establishment where

the youth is employed, or within 30 days of the youth's employment, goods are produced and removed for shipment in commerce, the youth is protected by the child labor provisions of the FLSA.

Chapter # 10 Occupational Safety and Health Act (OSHA)

Who is Covered?

In general, coverage of the OSH Act extends to all employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and all other territories under federal government jurisdiction. Coverage is provided either directly by the Federal Occupational Safety and Health Administration (OSHA) or through an OSHA-approved state occupational safety and health program, in states that have approved programs. Washington State has an OSHA approved state OSHA program.

Insert OSHA Poster (1-page total)

Definition of an "employer"

As defined by the OSH Act, an employer is any "person engaged in a business affecting commerce who has employees but does not include the United States or any state or political subdivision of a State." Therefore, the OSH Act applies to employers and employees in such varied fields as manufacturing, construction, agriculture, law and medicine, charity and disaster relief, organized labor and private education. Such coverage includes religious groups to the extent that they employ workers for secular purposes.

The following are not covered by the OSH Act:

a) Self-employed persons
b) Farms at which only immediate members of the farmer's family are employed
c) Working conditions regulated by other federal agencies under other federal statutes. This category includes most employment in mining, nuclear energy and nuclear weapons manufacture, and many segments of the transportation industries
d) Employees of state and local governments (unless they are in one of the states with OSHA-approved safety and health programs).
e) Other federal agencies are sometimes authorized to regulate safety and health working conditions in a particular industry. If they do not do so in specific areas, then OSHA requirements would apply.

Basic Provisions/Requirements

The OSH Act assigns to OSHA two principal functions: setting standards and conducting workplace inspections to ensure that employers are complying with the standards and providing a safe and healthful workplace. OSHA standards may require that employers adopt certain practices, means, methods or processes reasonably necessary to protect workers on the job. It is the responsibility of employers to become familiar with standards applicable to their establishments, to eliminate hazardous conditions to the extent possible,

and to comply with the standards. Compliance may include ensuring that employees have and use personal protective equipment when required for safety or health. Employees must comply with all rules and regulations that are applicable to their own actions and conduct.

Even in areas where OSHA has not promulgated a standard addressing a specific hazard, employers are responsible for complying with the OSH Act's "general duty" clause. The general duty clause of the OSH Act states that each employer "shall furnish . . . a place of employment which is free from recognized hazards that are causing or are likely to cause death or injury."

Federal OSHA Standards

Standards fall into four major categories:

- general industry
- construction
- maritime - shipyards, marine terminals, long shoring
- agriculture

Each of these four categories of standards imposes requirements that are targeted to that industry, although in some cases, they are identical across industries. Among the standards that impose similar requirements on all industry sectors are those for access to medical and exposure records, personal protective equipment, and hazard communication.

In general, all employers (except those in the construction industry) should be aware that any hazard not covered by an industry-specific standard may be covered by a general industry standard. In addition, all employers must keep their workplaces free of recognized hazards that may cause death or serious physical harm to employees, even if OSHA does not have a specific standard or requirement addressing the hazard. This coverage becomes important in the enforcement aspects of OSHA's work.

Other types of requirements are imposed by regulation rather than by a standard. OSHA regulations cover such items as recordkeeping, reporting and posting.

Recordkeeping: Every employer covered by OSHA who has more than 10 employees, except for certain low-hazard industries such as retail, finance, insurance, **real estate**, and some service industries, must maintain OSHA-specified records of job-related injuries and illnesses. There are two such records, the OSHA Form 200 and the OSHA Form 101

The OSHA Form 200 is an injury/illness log, with a separate line entry for each recordable injury or illness (essentially those work-related deaths, injuries and illnesses other than minor injuries that require only first aid treatment and that do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job). A summary section of the OSHA Form 200, which includes the total of the previous year's injury and illness experience, must be posted in the workplace for the entire month of February each year.

The OSHA Form 101 is an individual incident report that provides added detail about each individual recordable injury or illness. A suitable insurance or workers' compensation form that provides the same details may be substituted for the OSHA Form 101.

Unless an employer has been selected in a particular year to be part of a national survey of workplace injuries and illnesses conducted by the Department of Labor's Bureau of Labor Statistics (BLS), employers with ten or fewer employees or employers in traditionally low-hazard industries are exempt from maintaining these records; all employers selected for the BLS survey must maintain the records. Employers so selected will be notified before the end of the year to begin keeping records during the coming year, and technical assistance on completing these forms is available from the state offices which select these employers for the survey.

Again, industries designated as traditionally low hazard include: automobile dealers; apparel and accessory stores; furniture and home furnishing stores; eating and drinking places; finance, insurance, and **real estate industries**; and service industries, such as personal and business services, legal, educational, social and cultural services and membership organizations

Reporting: In addition to the reporting requirements described above, each employer, regardless of number of employees or industry category, must report to the nearest OSHA office within 8 hours of any accident that results in one or more fatalities or hospitalization of three or more employees. Such accidents are often investigated by OSHA to determine what caused the accident and whether violations of standards contributed to the event.

Employee and Employer Rights and Responsibilities

Employees are granted several important rights by the OSH Act. Among them are the right to: complain to OSHA about safety and health conditions in their workplace and have their identity kept confidential from the employer, contest the time period OSHA allows for correcting standards violations, and participate in OSHA workplace inspections.

Are all employees covered by the OSH Act?

The OSH Act covers all employees except workers who are self-employed and public employees in state and local governments.

In states with OSHA-approved state plans, public employees in state and local governments are covered by their state's OSHA-approved plan. Federal employees are covered under the OSH Act's federal employee occupational safety and health programs. United States Postal Service employees, however, are subject to the same OSH Act coverage provisions as are private sector employers.

The OSH Act does not apply to particular working conditions addressed by regulations or standards affecting occupational safety or health that are issued by federal agencies, other than OSHA, or by a state atomic energy agency. Other federal agencies that have issued requirements affecting job safety or health include the Mine Safety and Health Administration and some agencies of the Department of Transportation.

What are your responsibilities as an employer?

If you are an employer covered by the OSH Act, you must provide your employees with jobs and a place of employment free from recognized hazards that are causing, or are likely to cause, death or serious physical harm. Among other actions, you must also comply with the OSHA statutory requirements, standards, and regulations that, in part, require you to do the following:

- Provide well-maintained tools and equipment, including appropriate personal protective equipment
- Provide medical examinations
- Provide training required by OSHA standards;
- Report to OSHA within 8 hours accidents that result in the hospitalization of 3 or more employees., regardless of number of employees or industry category
- Report within 8 hours accidents that result in the hospitalization of three or more employees; regardless of number of employees or industry category, to the nearest OSHA office
- Keep records of work-related accidents, injuries, illnesses and their causes and post annual summaries for the required period of time.
- A number of specific industries in the retail, service, finance, insurance, and real estate sectors that are classified as low-hazard are exempt from most requirements of the regulation, as are small businesses with 10 or fewer employees
- Post prominently the OSHA poster informing employees of their rights and responsibilities;
- Provide employees access to their medical and exposure records
- Do not discriminate against employees who exercise their rights under the OSH Act
- Post OSHA citations and abatement verification notices at or near the worksite
- Abate cited violations within the prescribed period; and
- Respond to survey requests for data from the Bureau of Labor Statistics, OSHA, or a designee of either agency.

What are your rights as an employer?

When working with OSHA, you may do the following:

- Request identification from OSHA compliance officers
- Request an inspection warrant
- Be advised by compliance officers of the reason for an inspection
- Have an opening and closing conference with compliance officers
- Accompany compliance officers on inspections
- Request an informal conference after an inspection
- File a Notice of Contest to citations, proposed penalties, or both
- Apply for a variance from a standard's requirements under certain circumstances
- Be assured of the confidentiality of trade secrets
- Submit a written request to the National Institute for Occupational Safety and Health for information on potentially toxic substances in your workplace.

What are your responsibilities as an employee? To help prevent exposure to workplace safety and health hazards, you must comply with all OSHA requirements that apply to your actions and conduct.

What are your rights as an employee? In your associations with OSHA and your employer, you have the right, among other actions, to do the following:

- Review employer-provided OSHA standards, regulations and requirements
- Request information from your employer on emergency procedures
- Receive adequate safety and health training when required by OSHA standards related to toxic substances and any such procedures set forth in any emergency action plan required by an OSHA standard
- Ask the OSHA Area Director to investigate hazardous conditions or violations of standards in your workplace
- Have your name withheld from your employer if you file a complaint with OSHA
- Be advised of OSHA actions regarding your complaint, and have an informal review of any decision not to inspect or to issue a citation
- Have your employee representative accompany the OSHA compliance officer on inspections;
- Observe any monitoring or measuring of toxic substances or harmful physical agents and review any related monitoring or medical records
- Review at a reasonable time the Log of Work-Related Injuries and Illnesses if your employer is required to maintain it
- Request a closing discussion following an inspection
- Object to the abatement period set in a citation issued to your employer
- Seek safe and healthful working conditions without your employer retaliating against you.

Anti-Discrimination Provisions

Private sector employees who exercise their rights under OSHA can be protected against employer reprisal. Employees must notify OSHA within 30 days of the time they learned of the alleged discriminatory action. This notification is followed by an OSHA investigation. If OSHA agrees that discrimination has occurred, the employer will be asked to restore any lost benefits to the affected employee. If OSHA determines that there is a violation, the matter can be brought in front of the courts. In such cases, the worker pays no legal fees.

Chapter # 11 Americans with Disability Act (ADA)

Provisions of the Americans with Disabilities Act

The Americans with Disability Act (ADA) of 1990 provides nondiscrimination protection for individuals with disabilities in the areas of employment, public services, transportation, access to public facilities and telecommunications. As stated in the Act, its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Most of the ADA provisions took effect in 1992.

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;

- Has a record of such an impairment; or
- Is regarded as having such an impairment.

The ADA requires that no one can be discriminated against because of a disability to accessibility in any place of public accommodation. A public accommodation is a public or private entity which is open to public for commerce. The ADA requires the following to be accomplished, as long as it is “reasonably achievable”.

New construction, when not structurally impossible, must be made accessible to people with disabilities

Items that would be a barrier for architectural issues and communication issues must removed so that god and services can be accessed by folks with disabilities

Auxiliary aids and services must be provided so that no one who has a disability is excluded or treated different from other people.

Title III of the Americans with Disabilities Act

Title III covers businesses and nonprofit service companies that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, funeral homes, day care centers, and recreation facilities including sports arenas and fitness clubs. Transportation services provided by private entities are also covered by Title III.

Public accommodations must comply with nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment when ever it is reasonable to do so. They also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Also, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources.

Courses and examinations related to professional, educational, or trade-related applications, licensing, certifications, or credentialing must be provided in a place and manner accessible to people with disabilities, or alternative arrangements must be offered.

Commercial facilities, such as factories, must comply with the ADA's architectural standards for new construction.

All new construction and modifications must be accessible to individuals with disabilities. For existing facilities, barriers to services must be removed if readily achievable. Public accommodations include facilities such as restrooms, restaurants, hotels, retail stores, etc., as well as privately owned transportation systems.

The following groups are afforded protection by Federal and State anti-discrimination laws. These laws prohibit housing discrimination, regardless of intent, based on nine factors:

1. Race

2. Color

3. National Origin

4. Religion

5. Sex

6. Disability

7. Familial Status (families with children)

8. Age

9. Marital Status

These categories of citizens are referred to as "protected classes". The laws apply to any party involved, directly or indirectly, in a housing transaction, such as the sale, rental or financing of housing. This includes landlords, property managers, real estate brokers, appraisers and mortgage lenders. Local government and public agency policies and procedures are also governed.

Chapter # 12 Employee Retirement Income Security Act (ERISA)

What is ERISA?

ERISA stands for The Employee Retirement Income Security Act of 1974. ERISA establishes minimum standards for retirement, health, and other welfare benefit plans (including life insurance, disability insurance, and apprenticeship plans).

Who Administers ERISA?

ERISA is administered by the Employee Benefits Security Administration (EBSA), a division of the U.S. Department of Labor (DOL). Complaints, concerns, and questions about ERISA laws should be directed to your local office.

Who Must Abide by ERISA Law?

The protective laws under ERISA only apply to private employers (non-government) that offer employer-sponsored health insurance coverage and other benefit plans to employees.

ERISA does not require employers to offer plans; it only sets rules for benefits that an employer chooses to offer.

ERISA laws do not apply to privately purchased, individual insurance policies or benefits.

What Are Provisions Under ERISA?

ERISA regulates and sets standards and requirements for:

- **Conduct:** ERISA rules regulate the conduct for managed care (i.e., HMOs) and other fiduciaries (the person financially responsible for the plan's administration).
- **Reporting and Accountability:** ERISA requires detailed reporting and accountability to the federal government.
- **Disclosures:** Certain disclosures must be provided to plan participants (i.e. Plan Summary the clearly lists what benefits are offered, what the rules are for getting those benefits, the plan's limitations, and other guidelines for obtaining benefits such as obtaining referrals in advance for surgery or doctor visits);
- **Procedural Safeguards:** ERISA requires that a written policy be established as to how claims should be filed, as well as a written appeal process for claims that are denied. ERISA also requires (although the language is somewhat loose) that claims appeals be conducted in a fair and timely manner.
- **Financial and Best-Interest Protection:** ERISA acts as a safeguard to assure that plan funds are protected and delivered in the best interested of the plan members. ERISA also prohibits discriminatory practices in obtaining, and the collecting on, plan benefits for qualified individuals.

Other Areas Addressed Under ERISA

ERISA has been amended to include two additional areas that specifically address health insurance coverage. These laws are:

- The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA); and
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Chapter # 13 State Regulations and the Role of the Department of Labor and Industries

Introduction

In the following chapters, we will be discussing Labor and Industries, or as commonly called L&I. The Workers' Compensation (WC) classification system is a tool which L&I uses to collect loss information for each industry they insure. This loss information is used to

establish premium rates that employers in each industry will pay for their workers' compensation insurance.

Labor and Industry's goal is to produce fair insurance rates which reflect the hazardous nature of each industry. Employers engaged in more hazardous industries such as logging will tend to pay higher insurance rates than employers engaged in retail store operations.

This is a State Government division, and as such, L& I is not optional. They have strict laws on reporting, on who must be covered, and on classifications for each business.

L&I is a diverse state agency dedicated to the safety, health and security of Washington's 3.2 million workers. L&I assists employers in meeting safety and health standards and inspects workplaces when alerted to hazards. As administrators of the state's workers' compensation system, L&I is similar to a large insurance company. They provide medical and limited wage-replacement coverage to workers who suffer job-related injuries and illness. Their rules and enforcement programs also help ensure workers are paid what they are owed, that children's and teens' work hours are limited, and that consumers are protected from unsound building practices.

L&I serves customers in 20 offices throughout Washington, and has approximately 2,700 skilled employees, including safety inspectors, claims specialists, nurses, researchers, accountants, labor experts and support staff.

Labor and Industry's Division of Occupational Safety and Health (DOSH) administers the Washington Industrial Safety and Health Act (WISHA) law by developing and enforcing rules that protect workers from hazardous job conditions. Their inspectors visit about 7,000 workplaces each year and cite businesses that violate health and safety rules. Each year, they also conduct about 2,500 free, on-site safety and health consultations for employers who request help complying with these rules in their unique workplaces. They also conduct research into workplace health and safety, which focuses on promoting healthy work environments and preventing workplace injuries and illnesses.

L&I enforces child labor laws, as well as laws that protect workers' wages and working conditions. This agency also oversees apprenticeship programs and administers rules covering prevailing wage on public-works construction projects.

Protecting the public from unsafe work and economic hardship

Their technical experts protect the public by inspecting electrical work, boilers, elevators and manufactured homes. They also test and license electricians, certify plumbers, and issue operating permits for amusement rides. In addition, this agency registers construction contractors, requiring them to be insured and bonded. They also provide an easy-to-use web site that allows customers to see whether a contractor is bonded and insured and alerts them to problems associated with hiring unregistered contractors.

Industrial Insurance or Workers Compensation

Industrial insurance coverage protects both workers and employers from the financial impact of a work-related injury or occupational disease.

It pays for an injured worker's approved medical, hospital and related services that are essential to his/her treatment and recovery. An injured worker who is temporarily unable to work also receives partial wage replacement payments.

As an employer or prospective employer, a firm must provide industrial insurance coverage for their employees. Coverage is mandatory. In return, the company ordinarily cannot be sued for damages when a work-related injury or illness occurs.

Employers purchase coverage through the Department of Labor & Industries (L&I). L&I manages all claims and pays benefits out of an insurance pool called the Washington State Fund. The fund is financed by premiums paid by employers and employees, not by general revenue taxes.

However, employers may qualify for self-insurance if they demonstrate they have sufficient financial stability, an effective accident prevention program, and an effective administrative organization for an industrial insurance program.

Coverage and Exemptions

Mandatory Coverage

Generally, employers of one or more employees must provide industrial insurance coverage.

There are two ways to provide this coverage depending on the financial resources of the business. Most businesses participate in the state's industrial insurance program — the Washington State Fund.

Companies with at least $25 million in assets, and some governmental entities, may qualify for self-insurance.

The Department of Labor & Industries, Insurance Services Division, manages the Washington State Fund. This fund derives its income solely from premiums paid by an employer and their employees. The fund receives no money from general tax revenues.

The definitions of “employer” and “worker” used for industrial insurance purposes are located below. All Washington workers must be covered through the State Fund or by a certified self-insured employer, unless they are subject to an exemption listed in the next section.

Definition of an Employer

For purposes of industrial insurance coverage, an employer is defined as follows within RCW 51.08.070.

“Employer” means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.

Definition of a Worker

For purposes of industrial insurance coverage, a worker is defined as follows within RCW 51.08.180.

“Worker” means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

So, a person is an Employer if they hire and direct a person’s work. And a person is a worker or employee if in the course of their duties they are supervised by employer, use the equipment of employer or they may also meet the criteria for an independent contractor. If a firm enters into a contract with an independent contractor, a firm may be required to provide industrial insurance coverage during the period of the contract.

The firm must cover the contractor if he or she is a worker as defined in the industrial insurance laws. That definition (see previous section) includes workers "... working under an independent contract, the essence of which is his or her personal labor."
The legal question of whether an independent contractor should be considered a worker employed by the contracting party, for industrial insurance purposes, has been the subject of a number of court cases.

RCW 51.08.195 gives an employer an alternative six-part test to determine if an independent contractor is exempt from mandatory coverage. This law has been adopted for both L&I and Employment Security, giving an employer an advantage in that both agencies will use the same six-part test to determine exemptions for independent contractors.
The six-part test states that a person is exempt if:

1. He or she is free from control and direction over the performance of the services, AND
2. The service provided is outside the usual course of business OR it is performed outside all of the places of business of the hiring enterprise OR the hired individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed.

OR

3. The individual is engaged in an independently established trade of the same nature as the contract, OR the individual has a principle place of business eligible for IRS business deduction, AND
4. The individual is responsible for filing a schedule of expense and income with the IRS for the business, AND
5. On the effective date of contract or within a reasonable period, has established required accounts with state agencies, AND
6. The individual maintains a separate set of books and records that reflect items of income and expense for the business.

You are subject to penalties for not covering an independent contractor if, under the law, coverage is required.

Both real estate brokers and property management broker have some of the same duties and often an agency will provide both services. In this case, the differences, for L&I purposes are as follows. If the person is a licensed real estate broker, and oversees property (forms, rent, sales etc) this person is under the real estate classification. However, if this person oversees or performs repair, care of units, cleaning, or supervising of on site management, they should be classified under the property management classification.

Exempt Employment

L&I does not require coverage for the following employees. These are the only exceptions allowed in the real estate and property management classifications:

1.) A sole proprietor or partner of a business.

2. Members of a limited liability company (LLC) if they manage the company (and there are no managers), or managers of a LLC who are also members and who exercise substantial control in the daily management of the company. Only eight managers may be exempted unless all managers are related by blood within the third degree of marriage.

3. Corporate officers of a public corporation are exempt if they meet the following criteria:

a. A bona fide corporate officer who also is on the board of directors and a shareholder, being elected according to the corporation's bylaws and articles of incorporation, **And**

b. Has the substantial control in daily management of the corporation.

Non-public corporations may exempt up to eight persons, regardless of the performance of manual labor, if they are bona fide officers, have substantial control in daily management of the corporation and are a shareholder. However, any number may be exempt if they are all related by blood within the third degree of marriage and are bona fide officers.

Corporations that choose to cover officers, who may be exempt, must apply to L&I for coverage. L&I will not honor claims unless an Application for Elective Coverage has been completed by the non-public corporation and filed with the department.

Some agencies have considered a designated broker, or a broker with supervisory duties as exempt employees. This is not the rule. Unless one is a shareholder, officer and director, they do not fall into the exempt classification.

Securing the Current Rates for Real Estate and Property Management Firms

To obtain industrial insurance coverage through the Washington State Fund, a business owner must open an account by completing and returning a Master Business Application. This form is available from office of the Department of Revenue.

Once a business opens an account, they will be assigned an account manager who can answer questions specific to real estate sales or property management.

Employer Classifications

The basic premium for the industrial insurance coverage depends on the risk classification or classifications assigned to a business.

Generally, it is the business of the employer that is classified, not the separate occupations or operations of individual employees within the employer's business. So, there would be a distinction between real estate and property management for risk classification.

When the firm applies for an industrial insurance account, State Fund Underwriters will assign one or more risk classifications based on the type of business described on the firm's application. If the classifications assigned to the business do not appear to be correct, or the nature of the business changes, a change in the risk classification may be required. If

a business needs to request a change, or needs more information on employer risk classifications, they should call their account manager or L&I.

Soon after the firm opens an industrial insurance account with L&I, the firm will receive a Workers' Compensation Rate Notice. It will also receive a new rate notice whenever Labor & Industries adjusts premium rates or when the firm's individual experience factor rating is recalculated. This rate notice calculates the rate that the firm will pay per worker-hour/unit for each risk classification assigned to the business. These hourly/unit rates are referred to as "composite rates" because they are a combination of three separate components: the accident fund rate, the medical aid rate and the supplemental pension assessment. The rate notice also shows these three elements individually.
Base rates are the benchmark premium rates for each risk classification. The components for this "composite rate" are;

Accident Fund:
Provides for wage replacement, permanent disability and death benefits, as well as certain vocational rehabilitation benefits for injured workers.

Medical Aid Fund:
Provides for medical care and vocational rehabilitation counselor services for injured workers.

Supplemental Pension Fund:
Provides for Cost Of Living Adjustments (COLA) for injured workers receiving extended wage replacement benefits. For the accident and medical aid funds, the base rates reflect the estimated cost of providing insurance for workers in that risk classification. The Supplemental Pension hourly rate is the same for all classes and is not related to the risk in the class.

What is experience rating?

It is the result of workers' hours or units (exposure) and claims (losses) occurring during a period that we call the experience period. This result will affect the firm's industrial insurance rates for a calendar year.

The experience factor is printed on the firm's **Workers' Compensation Rate Notice**. L&I will determine the firm's premium rates by multiplying your experience factor by the sum of the accident fund and medical aid base rates, then adding the supplemental pension assessment.
A claim will affect the firm's experience rating and premium rates for three years. For example, a claim with a date of injury between July 1, 2005 and June 30, 2006 affects premiums for calendar years 2008, 2009 and 2010.

Businesses that have common majority ownership will be experience rated together on the same policy and share the experience factor.

In most cases, businesses that are sold and continue to perform the same operations in Washington state will have the same experience transferred to the new ownership.

What is the experience period?

The experience period is the oldest three of the four fiscal years preceding the effective date of premium rates (Fiscal year = July 1 through June 30.). The premium rates are effective on January 1 of each year.

Labor & Industries calculates the experience factor by comparing your accident costs to the average costs of other companies having the same classification as your business. An experience factor greater than 1.0 indicates a business has had higher than average claim costs. A factor lower than 1.0 shows a business has had lower than average claim costs. New businesses usually start out with a factor of 1.0 until they become experience rated.

Experience Period Covers Fiscal Years Affects Rates for Calendar Year
07/01/06 – 06/30/09 2007, 2008, 2009 2010
07/01/07 – 06/30/10 2008, 2009, 2010 2011
07/01/08 – 06/30/11 2009, 2010, 2011 2012
07/01/09 – 06/30/12 2010, 2011, 2012 2013

A claim will affect the firm's experience rating and premium rates for three years. For example, a claim with a date of injury between July 1, 2005 and June 30, 2006 affects premiums for calendar years 2008, 2009 and 2010.

The experience factor is printed on the firm's *Workers' Compensation Rate Notice*. L&I will determine your premium rates by multiplying your experience factor by the sum of the accident fund and medical aid base rates, then adding the supplemental pension assessment.
Column 1 is under investigation by the head of L&I still and if enacted this year for 2010 these will be the rates. The current rates are under composite base rates 2009.

Calculating Real Estate Brokers' L&I costs
Because of the intricate nature of the real estate business L&I has determined that the reporting and payment for real estate brokers is 40 hours if a full-time agent, and 8 hours a day if part time.

Example

I am working as a broker full time (or as most broker know All of the time) for a real estate brokerage. I will be base rated at 40 hours a week regardless of the actual hours worked. If I am just working part time for the brokerage, perhaps just weekends (2 days), then I am rated on 8 hours a day worked or 16 hours, regardless of the actual hours worked.

Reporting using the average hourly wage calculation method

The average hourly wage calculation method is an alternative to reporting actual hours worked that is allowed for firms that report apartment house managers, caretakers, or similar employment where compensation is not tied directly to hours worked. The calculations for this type of reporting will be detailed in Chapter #8. The compensation is tied to the housing and other factors which determine the "real" compensation costs.

Benefits from L&I

An employer, or prospective employer, must provide industrial insurance coverage for their employees. Coverage is mandatory. In return, the firm ordinarily cannot be sued for damages when a work-related injury or illness occurs.

Industrial insurance coverage protects both workers and employers from the financial impact of a work-related injury or occupational disease. Washington State has the fifth-highest benefits for injured workers in the nation, while 34 states have higher average premiums. Workers are represented on the Workers' Compensation Advisory Committee, which advises the Department of Labor & Industries on issues involving injured workers.

The law prohibits any employer from discriminating against employees in any way for exercising their rights under the industrial insurance law or for filing a complaint about workplace safety. However, it does not prevent an employer from taking action against an employee for unsafe work practices.

Benefits

Employees are eligible for industrial insurance benefits when a work-related injury or occupational illness occurs. Benefits also are paid if an employee is injured during a meal period at the job site, even though the person was not working at the time.

Benefits are not paid for intentional self-inflicted injuries or for injuries to an employee who is committing or attempting to commit a felony. All benefit levels, and the conditions for benefits, normally are set by the state Legislature.

Types of Benefits

Medical services. If an employee's claim is accepted, L&I pays for all approved health care providers, hospital, surgical, pharmacy and other health-care services necessary for the treatment of an employee's workplace injury or occupational disease. Usually, there are no out-of-pocket expenses to the firm or the employee. Injured employees may select a health-care provider who is qualified to treat their injury or occupational disease.

Time-loss compensation payments (wage-replacement benefits). Employees receive a percentage of their regular wages if they are unable to work because of an industrial injury or illness. These are known as time-loss compensation payments.

Prescription medication coverage. L&I or a self-insured employer only pays for prescription medications necessary for treatment of accepted conditions resulting from industrial injuries and occupational diseases on open and allowed workers' compensation claims.

Travel and Property Reimbursement. Travel costs more than 10 miles one-way from an injured employee's home may be reimbursed under some circumstances when pre-approved by the claim manager for:

- Treatment for the accepted condition.

- An independent medical examination requested by the claim manager.
- Approved vocational activities.

Personal property lost or damaged during an industrial accident may be reimbursed in some cases. Coverage is limited to:

- Prescription eye glasses or contacts.
- Clothing.
- Shoes or boots.
- Personal protective equipment.

Pensions or Payments for the Disabled. When an injured worker has completed treatment but has suffered a permanent disability, he/she may qualify for a permanent partial disability award. Some awards are set by state law, but many others must be rated by a qualified doctor. If an employee looses (or looses the use of) both legs, both arms, an arm and a leg, or vision, they are eligible for a monthly pension by law. This is true even if they can return to work. If, after medical and vocational evaluations, L&I finds that an injury prevents an injured employee from ever become gainfully employed, they may receive a pension.

If an injured employee is unable to work due to an industrial injury, they may work with a Vocational Rehabilitation Counselor (VRC) to develop a training plan to train for a new job. The VRC will discuss with the injured employee the vocational process and the options available.

Once the training plan is approved by L&I, there are 2 options:

- Option 1 is to participate in the plan approved by L&I.
- Option 2 gives the injured employee the ability to develop a plan on their own.

A worker must use licensed, accredited, or otherwise approved training programs with the Option 2 benefits.

Survivor benefits.

The surviving spouse and legally dependent children receive a monthly pension if a work-related injury or occupational illness results in an employee's death.

The amount they receive is based on the formula used for setting time-loss compensation payments. In addition, survivors receive an immediate cash payment of 100 percent of the state's average wage, for deaths that result from injuries. The wage rate changes each July 1.

Special Situations

There are special situations, called “second injury claims,” in which certain claim costs are not charged back to the employer and do not affect the experience rating. Instead, these claim costs are paid from the Second Injury Fund, which was created to encourage employers to hire previously disabled workers. It protects firms against certain financial risks should such workers suffer further injury after they are hired.

The Second Injury Fund comes to the firm’s aid in two ways:

If a worker’s death or permanent total disability is caused by the combined effect of a previous disability and a new industrial injury, and not by the injury alone, all claim costs not directly related to the new injury will be paid out of the Second Injury Fund. Only those claim costs directly related to the new industrial injury will go on the new employer’s accident experience record. This separation of claim charges prevents the new employer’s account from being penalized for death or pension benefits when such benefits are not their obligation. The Second Injury Fund also is used to pay all claim costs arising from a preferred worker claim.

Washington’s industrial insurance system protects employers against massive losses that can result from a major catastrophic accident. When a single accident kills or permanently disables three or more of a firm’s employees, all non-medical claim costs are paid out of a special “catastrophic injury account. The accident experience record is only charged for the cost of two single pension claims – each equal to the average of all pension claims resulting from that catastrophic accident.

Record Keeping Requirements

Each employer must send a quarterly report to L&I. This can be done on line or manually. Quarterly reports are due 4 times each year. Below is a chart that indicates the dates that make up that quarter, and the date that the report and payment is due to L&I.

Quarter	Report period	Report & payment due by
1	January 1 through March 31	April 30.
2	April 1 through June 30	July 31.
3	July 1 through September 30	October 31.
4	October 1 through December 31	January 31.
Due dates fall on a weekend? The report may be postmarked the following business day.		

Insert Quarterly Report (2 pages total)

Employers have the option of filing their industrial insurance quarterly reports online and paying premiums with electronic fund transfer or paper check. Online forms automatically calculate premiums, eliminating the calculations that must be done with paper reports.

Reporting by Mail

Near the end of each calendar quarter, L&I will mail the quarterly reports. This form is used to report hours (or other reporting units) for industrial insurance. (The report form includes instructions.) Employers who report on the "hour" basis will be asked to list the actual payroll and total number of hours worked in covered employment for the preceding quarter, broken down by industrial insurance risk classification. The composite rate for each risk classification assigned to each business and is preprinted on the form. The rate is expressed in terms of dollars per worker hour/unit.
Quarterly reports must be filed online or postmarked on or before the due date. Payment must be made by the due date. Otherwise, the report becomes delinquent and Labor & Industries imposes penalties.

If a firm does not receive their quarterly report before the close of the quarter, they should contact their policy manager or local Labor & Industries' office. If there are no worker hours/units to report, no premium is due. However, whether one files online or by mail, there still must be a quarterly report marked "zero hours" or "no payroll" submitted.

Generally, companies would report the actual number of hours/units worked by their employees. Sick-leave hours, vacations or holidays, even if it is paid leave, are not reported. Report overtime work is reported on a one-to-one basis, in other words, each hour of overtime work is reported as one hour, even though time-and-a-half wages may have been paid.

It is difficult to keep an accurate record of actual hours worked for certain types of employees. For this reason, other methods for determining the number of hours to report have been developed. If any of your employees fit into one of the following categories, use the method described to report their hours.

Commissioned personnel

When a firm pays their workers a percentage of the amount charged for the product or service, the employee becomes a commissioned worker. For commissioned employees who work primarily at the firm's premises, an employer would have to report actual hours. For commissioned employees who work primarily away from company premises, the firm would report either assumed or actual hours worked. In real estate brokerages, this rule would apply:

If a daily record of actual hours is kept for each worker, the firm must report all of their commissioned workers using the same method (either assumed or actual hours).

Example

> For real estate brokers use the rate of $.1587 which means 15.87 cents per worker hour/unit as the composite rate. To determine the premium due, multiply the worker hours/units, not the payroll dollar amount, by the composite rate for each classification. The broker is a FT employee or works 160 hours in a month (assumed). $0.1587 X 160=$25.39 per month.

Each company must keep records of each employee's start and end employment dates. If a firm reports assumed hours, they report either eight hours for each day any work is performed or report 160 hours per month. If they use the 160-hour rule, are able to report 8 hours per day for new or terminated workers who work a partial month at the beginning or end of their employment. No reduction to reportable hours can be made for vacation, holiday or sick leave when reporting assumed hours.

Salaried personnel

Companies may report salaried workers using either 160 assumed hours per month for each worker or report the actual hours worked if a daily record of actual hours is kept for each worker. A firm must be consistent in reporting all salaried workers time by using the same method (either assumed or actual hours).

Record keeping of the date each worker begins and ends employment must be kept. When a firm is using the 160-hour rule, the report may indicate 8 hours per day for new or terminated workers who work a partial month at the beginning or end of their employment. No reduction to reportable hours can be made for vacation, holiday or sick leave when using the 160-hour rule.

Optional elective coverage

When optional coverage for an owner (sole proprietor, partner, exempt LLC member or manager or corporate officer) is purchased, reports may be using either 160 assumed hours per month or actual hours, if a daily record of actual hours is kept. If there is additional optional coverage for other exempt workers, other than jockeys, reporting must be done with the actual hours, if paid on an hourly, part-time salaried, commission or piecework basis. Under optional coverage for full-time salaried workers, the report must be made on 160 hours per month.

If a quarterly report is not submitted, L&I will estimate the premiums due based on the best information they have available and will take steps to collect the premiums owed.

In addition, penalties will be assessed on delinquent accounts. The longer the account is delinquent, the greater the penalty. The minimum penalty is $10. Remember a report must be submitted even if it has only to report no hours/units. A late report indicating "no hours/units" will be assessed a $10 penalty.

Interest will be assessed on all delinquent accounts at a rate of 1 percent per month on the premium owed. L&I counts the number of calendar days that have elapsed since the due date, including the date the report or payment was received.

State law requires every employer to keep records that will allow Labor & Industries to compute premiums. These records must be open for examination by L&I. Accurate, properly maintained, records will help you manage your business and, in case of an audit, minimize the time needed for an accurate review.

To properly document hours reported on quarterly reports, maintain the following payroll and time records on each employee for at least three years:

■ Employee name, address and Social Security number
■ Date hired (and terminated, if applicable)
■ Job title and type of work performed
■ What type of compensation (hourly, salary, etc.)
■ Pay period
■ Actual hours worked each day

Keep records of actual hours worked, for workers paid on an hourly or piecework basis, must be done. The number of units earned or produced for piece workers must also be recorded.
Keeping records of the actual hours that outside commissioned and salaried employees work is optional.

If an employee is assigned to more than one risk classification, records of actual hours worked each day must also show how many hours the employee worked in each class.
■ Gross pay
■ Deductions from earnings and the purpose of each deduction
■ Net pay
■ Check numbers of checks issued

In addition to payroll and time records, the following tax records also need to be maintained for at least three years:

■ Unemployment tax returns from the Employment Security Department
■ State excise tax returns from the Department of Revenue
■ Internal Revenue Service forms and tax returns. For example, W-2 statements, Form 941 (quarterly report), Form 1099 (miscellaneous income), Form 1065, Form 1040 (Schedule C)
Other records and information that may need to be referenced include:
■ Check registers
■ Canceled checks
■Cash disbursement journal (materials and supplies; miscellaneous contract labor)

Accident Reports
A firm should keep complete records of all accidents, including minor ones. Even minor mishaps sometimes turn into injuries that require medical attention. Filling out these forms should be done as soon as possible after the incident.
Accident-related records that should be kept are:
■ The injured worker’s report of accident
■ The supervisor’s report of accident
■ Industrial insurance claim log
■ Claim date record
Firms use these records for completing the Employer’s Report of Industrial Injury or Occupational Disease form or when resolving claim disputes.

Audits

Labor & Industries can audit any firm's employment records. During an audit, an L&I auditor will inspect business operations and examine records to verify that the workers' payroll and hours have been reported accurately. An L&I auditor also will ensure that worker hours and claims associated with the businesses' account are in the appropriate risk classification

Posting Requirements

Industrial insurance requires employers to post the following information:

Certificate of Coverage

Companies must obtain a Certificate of Insurance Coverage and post it conspicuously in their place of business. If a firm has more than one business location, separate certificates of coverage must be posted in each facility. The certificate is issued when opening an account with L&I. Obtaining replacements please call the L&I office nearest to your place of business.

Required Posters

L&I will send you three posters that inform your employees of their rights and responsibilities as workers. They must be displayed where employees can see them. The required posters are:
■ Notice to Employees – Industrial Insurance (F242-191-909)
■ Job Safety and Health Law (F416-081-909)
■ Your Rights as a Worker (F700-074-909)
Obtaining copies of these posters may be done by calling any local L&I office or ordering online.

Insert Required Poster (3 posters)

How to Contact L&I

L&I can be contacted online, by telephone, by mail, or in person at L&I service locations around the state.

General information can be found at www.lni.wa.gov/

Report Fraud: www.Fraud.lni.wa.gov

Toll-free Numbers

■ Automated claims information: 1-800-831-5227 An automated telephone system that answers common claim-related information for injured workers, employers and medical providers.

■ Office of Information and Assistance: 1-800-547-8367 This office serves as a central point of contact in Labor & Industries. Customer service representatives answer general questions about workers' compensation, workplace safety and health and other L&I services.

■ Safety and Health Information Line: 1-800-423-7233 Provides a menu of options callers can use to request safety and health rules, learn about "right to know" billing, obtain information on ergonomics, order posters and publications and more. To make a workplace-related safety and health complaint, please call the L&I office nearest you.
■ Provider Line: 1-800-848-0811 Service providers involved in the care and treatment of injured workers use this number to obtain authorization for services and answers to billing questions.
■ Report Fraud: 1-888-811-5974 Use this number to report contractor, employer, workers' compensation, or medical provider fraud.
Claim Specific Claim and Account Center at:
www.ClaimInfo.wa.gov

How does a business contact L&I?
Contact L&I online, by telephone,

Option 2 Helpline 1-360-902-9135
Provider Hotline.....1-800-848-0811
General 1-800-547-8367

By Mail

Department of Labor & Industries
Insurance Services
PO Box 44291
Olympia, WA 98504-4291

In Person

To find a location near you:

Go to www.lni.wa.gov.

There are multiple locations throughout the state.

Chapter # 14 When Size of Business Provides Exemptions (e.g., number of employees) on Which Laws and Regulations Affect the Business

In many of the business laws there are exemptions based on number of employees or the amount of revenue generated by a client. Some have exemptions based on Federal contracts, or State government. Below is a list of some of the laws and their standards for firms. This is not to be taken as a complete list. Firms should check with legal representation prior to making decisions on an exemption status.

FMLA applies to employers with 50 or more employees.

EEO, Title VII of the Civil Rights Act of 1964 applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government. This includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual

harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

OSHA Every employer covered by OSHA who has more than 10 employees, except for certain low-hazard industries such as retail, finance, insurance, real estate, and some service industries, must maintain OSHA-specified records of job-related injuries and illnesses. There are two such records, the OSHA Form 200 and the OSHA Form 101

Unless an employer has been selected in a particular year to be part of a national survey of workplace injuries and illnesses conducted by the Department of Labor's Bureau of Labor Statistics (BLS), employers with ten or fewer employees or employers in traditionally low-hazard industries are exempt from maintaining these records; all employers selected for the BLS survey must maintain the records. Employers that are selected will be notified before the end of the year to begin keeping records during the coming year, and technical assistance on completing these forms is available from the state offices which select these employers for the survey.

Chapter # 15 Definitions on the Difference Between Employees, Independent Contractors, Leased Workers, and Temporary Workers. Also Include Employment Definitions under IRS code, RCW 51.08, and WAC 296-17A-7202.

Independent Contactor vs. Employees

This distinction is important for federal income tax purposes and affects the relationship between a designated broker and a licensee. According to the IRS, the courts have considered many facts in deciding whether a worker is an independent contractor or an employee. These considerations fall into three main categories. The remainder of this section was taken directly from the IRS website:

Behavioral Control- These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually control the way

the work is done – as long as the employer has the right to direct and control the work. For example:

Instructions- If you receive extensive instructions on how work is to be done, this suggests that you are an employee. Instructions can cover a wide range of topics, for example:

How, when and where to do the work
What tools or equipment to use
What assistants to hire to help you with the work
Where to purchase supplies and services

If you receive less extensive instructions about what should be done, but how it should be done, you may be an independent contractor. For instance, instructions about time and place may be less important than directions on how the work is performed.

Training – If the business provides you with training about required procedures and methods, this indicates that the business wants the work done in a certain way, and this suggests that you may be an employee.

Financial Control – These facts show whether there is a right to direct or control the business part of the work. For example:

Significant Investment – If you have a significant investment in your work, you may be an independent contractor. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an independent contractor.

Expense – If you are not reimbursed for some or all business expenses, then you may be an independent

contractor, especially if your unreimbursed business expenses are high.

Opportunity for Profit and Loss – If you can realize a profit or incur a loss, this suggests that you are in business for yourself and that you may be an independent contractor.

Relationship of the Parties - These are facts that illustrate how the business and the worker perceive their relationship. For example:

Employee Benefits – If you receive benefits, such as insurance, pension, or paid leave, this is an indication that you may be an employee. If you do not receive benefits, however, you could be either an employee or an independent contractor.

Written Contracts – A written contract may show what you and the business intend. This may be very significant if it is difficult, if not impossible, to determine status based on other facts.

When You Are an Employee

Your employer must withhold income tax and your portion of social security and Medicare taxes. Also, your employer is responsible for paying social security, Medicare, and unemployment (FUTA) taxes on your wages. Your employer must give you a Form W-2, Wage and Tax Statement, showing the amount of taxes withheld from your pay.

You may deduct unreimbursed employee business expenses on Schedule A of your income tax return, but only if you itemize deductions and they total more than two percent of your adjusted gross income.

When You Are an Independent Contractor

The business may be required to give you Form 1099-MISC, Miscellaneous Income, to report what it has paid to you. You are responsible for paying your own income tax (Self-Employment Contribution Act –SECA). The business does not withhold taxes from your pay. You need to make estimated tax payments during the year to cover your tax liabilities. You may deduct business expenses on Schedule C of your income tax return.

Contingent (Temporary or Leased) Workers

Important Points

• **Which jobs.** Your policy may need to address which jobs may be filled by contingent workers (e.g., only professionals, only clerical, as needed, etc).

• **Qualifications.** Even though the employees may be hired only for a season or for a limited number of hours per week, your policy should identify the needed qualifications.

• **Policies.** Identify which policies (confidentiality, conflict of interest, use of business equipment and facilities, smoking, dress, attendance, employment at will) that apply to contingent workers.

• **Discrimination policies.** You may want to affirmatively state that your discrimination policies apply to contingent workers.

• **Benefits.** Your policy may need to vary regarding what benefits are offered to contingent workers. It may range from none for the person who is an employee of an agency or an independent contractor to full benefits for the contingent worker who is an employee working full-time for a multiyear project. For example, if the person is your employee and works more than 1,000 hours in a year, you may be required to allow them to participate in your retirement plan. Similarly, you may not be able to attract enough contingent workers for a season if you do not offer some sick-leave benefits. Your policy should spell out the differences in benefits, if any, among contingent workers (e.g., full-time, part-time, seasonal, temporary, project, and professional workers).

• **Insurance.** You may need to determine if your workers' compensation or general liability insurance policy applies.

• **Compensation.** If you do not offer significant benefits to seasonal, part-time or contract labor, you may need to increase the compensation in order to attract quality personnel. Does your compensation policy allow you to pay contingent workers more than the budgeted rate for a full-time position? Is there a potential equal pay problem? Are contingent workers paid only by the hour or only a fixed fee for a project?

• **Telecommuting.** You may need to coordinate your telecommuting scheduling with your seasonal or part-time employees. Often, the "virtual office team" never actually meets, but instead transmits information back and forth electronically.

• **Independent contractors.** Your policy should clearly define what is a contingent worker, who is an employee, and who is not an employee. If you do not, you may face the prospect of managers using your contingent workers to fill regular positions. For example, if you have a hiring freeze on regular employees but permit managers to hire contingent workers, those contingent workers may end up working for you for years.

Legal Points

• **Employee or independent contractor?** If a contingent worker is an employee, then the employer has a variety of obligations under federal and state law. The individual may be an employee of both the company and the staffing agency.

• **Joint employers.** Contingent workers may be employees of both the company and the agency that supplies them. If company and agency both exert significant control over the same employee or these independent employers share particular matters, the employers may be "joint employers."

• **Immigration laws.** Contingent workers who are employees must still be qualified to work in the United States. If you obtain contingent workers through an agency that employs them, you can require the agency to confirm the individual's right to work in this country. If you attempt to use contingent workers as "independent contractors" to avoid the I-9 form, please keep in mind that the Immigration Service may maintain that the worker really is your employee, and that you are still responsible for completing an I-9.

• **Occupational Safety and Health Administration (OSHA).** Contingent workers who are employees are to be provided a safe work place under OSHA standards. Contingent workers who are not employees may be able to sue for negligence if harmed at your workplace.

• **Discrimination laws.** Generally, if discrimination laws apply to you, they protect not only your regular full-time employees, but also contingent employees and some independent contractors. EEOC looks at the following factors to determine if a contingent worker is an employee or an independent contractor.

According to EEOC policy guidance, the following factors indicate if a worker is a covered employee:

—The company or client has the right to control when, where, and how a worker performs the job

—The work does not require a high level of skill or expertise

—The company or client rather than the worker furnish the tools, materials, and equipment

—The work is performed on the premises of the company or client

—There is a continuing relationship between the worker and the company or client

—The company or client has the right to assign additional projects to the worker

—The company or client sets the hours of work and the duration of the job

—The worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job

—The worker has no role in hiring and paying assistants

—The work performed by the worker is part of the regular business of the company or client

—The company or client is itself in business

—The worker is not engaged in his or her own distinct occupation or business

—The company or client provides the worker with benefits such as insurance, leave, or workers' compensation

—The worker is considered an employee of the company or client for tax purposes (i.e., the entity withholds federal, state, and Social Security taxes)

—The company or client can discharge the worker

—The worker and the company or client believe that they are creating an employer/employee relationship

Even if the person is an independent contractor, EEOC sometimes takes the position that federal, antidiscrimination statutes prohibit an employer not only from discriminating against its own employees but also from interfering with an individual's employment opportunities with another employer. Thus, if the employer has a contingent worker fired by the staffing agency, EEOC may urge that the employer is liable. At times, EEOC may assert that the staffing agency and the company may be joint employers.

• **Equal Pay Act.** You will need to carefully monitor whether the differences in pay and benefits between regular, full-time employees and contingent employees suggests any unlawful discrimination.

• **Title VII.** Contingent workers who qualify as employees are protected by Title VII. EEOC also maintains that contingent workers who are independent contractors can be protected by Title VII if the company unlawfully interferes with that worker's employment with another entity based on a protected characteristic.

• **Americans with Disabilities Act (ADA).** EEOC asserts that the ADA protects many contingent workers. It maintains that a staffing firm or its client that qualifies as an employer of a contingent firm worker may be liable for:

—Its own discrimination against the worker or

—Discrimination by the other entity if it either participates in the discrimination or knew or should have known of the discrimination and failed to take corrective action within its control.

A staffing firm that does not qualify as a worker's employer may still be liable for discrimination if it:

—Interferes with the worker's ADA rights or

—Qualifies as an employment agency, in that it refers potential employees to employers or provides employers with the names of potential employees.

Finally, a company that does not qualify as a contingent worker's employer may still be liable if it interferes with the worker's ADA rights.

• **Age Discrimination in Employment Act (ADEA).** Like other discrimination laws, the ADEA can apply to contingent workers.

• **Family and Medical Leave Act (FMLA).** Keep in mind that the Family and Medical Leave Act applies to individuals who have worked at least 1,250 hours in the past 12 months. For example, a person who works an average of 25 or more hours per week may be eligible for family and medical leave. State laws may set higher or lower standards. The number of contingent workers may also be counted in order to determine if your facility is covered by FMLA.

• **Negligent hiring.** If you do not perform a similar reference check on contingent workers as on other employees, you can be sued for negligent hiring if one of the contingent workers assaults a customer. Review your hiring procedures for your contingent workforce. You may not need to perform a reference check, but you may need to require the agency that provides the contingent worker do so.

• **Workers' compensation.** Your contingent worker may be covered by your workers' compensation policy or by the policy of the agency that supplies them. If the worker is truly an independent contractor, you may be able to obtain coverage under your workers' compensation or general liability policy.

• **Taxes.** Companies that fail to withhold from contingent workers who are actually employees may encounter problems with the Internal Revenue Service.

• **Fair Labor Standards Act (FLSA).** Companies that do not pay overtime to contingent workers who are actually employees can be sued for violations of the FLSA.

• **The Employee Retirement Income Security Act (ERISA).** ERISA may require you to permit contingent employees to participate in your retirement plan. With respect to your health benefits, you may be able to exclude contingent workers. However, care should be taken to ensure that if an individual who is initially classified as contingent works the required number of months to become eligible for the health care plan, you determine if your health plan requires you to offer the person the opportunity to enroll in the plan. You should carefully review company health care and other insurance plans for their definitions of contingent, part-time, temporary, regular, full-time, independent contractor to ensure that you are applying the policies correctly. Some "contingent" workers have successfully sued to be included in an employer's plans.

Things to Consider

• **What type of work is needed?** As you develop your policy, you should consider if you need project employees, consulting employees, temporary employees, seasonal employees, part-time employees, or independent contractors. If you need all of these types of workers, you may need a distinct policy for each.

• **Coordination with other policies.** What policies are impacted by contingent workers? Your drug testing policy? Attendance policy? Compensation policy? Consider that your leave policies and your contingent employee policies may need to be closely coordinated. For example, an employee who has been injured in an accident might be able to fill a contingent position. Generally, all of your policies regarding performance and conduct will apply to everyone employed to provide services on your premises. However, there may be exceptions, and you will need to consider whether, for example, independent contractors are subject to your drug testing, confidentiality, conflict of interest policies, and the like.

• **Which positions?** As you draft your policy you need to consider which positions are to be filled by contingent workers. Projects only? One-time needs such as software conversion? Can every position be filled in this manner? Can

only some positions be filled? Are there positions that can be filled only by contingent workers? Are there some jobs that are to be performed by only independent contractors? These considerations may change as your company evolves, adds businesses, or ceases doing particular types of work.

• **Professionals.** Consider if you only need to use professionals as contingent workers (e.g., accountants, attorneys, computer programmers, and trainers).

• **What type of contingent worker?** Are contingent workers only for an outsourced function (e.g., accounting or human relations)? Are they leased employees who obtain all of their benefits from the leasing agency? Are only independent contractors used? Are they self employed? Are only project employees used? Are only temporary employees used? Are they home based? Are they full- or part-time positions?

• **Applicant pool.** Does the use of contingent workers increase the size of the applicant pool? Does it improve the quality of available workers?

• **Staffing agency.** If the contingent workers are placed by a staffing agency, what does the agency do to screen an applicant? How does the staffing service treat its employees? Does the staffing company have an internal service quality program or special certification? What is the turnover at the staffing company? When a contingent worker fails to show, can the staffing company send a quality replacement promptly?

Example:

Contingent workers may be hired for a specific project, for one-time events (e.g., software conversion), for skills not normally required (e.g., training), for professional services (e.g., accounting), to substitute for employees on leave, or when the workload is projected to exceed (for several months) the ability of regular, full-time employees to accomplish the work on a timely and quality basis.

Appropriate requisition forms are to be completed justifying the use of a contingent worker prior to the time a search is undertaken to locate a contingent worker. Generally, contingent employees should not be hired for more than one project or for more than four months. If they were hired because it was required by law or for a special project, this time can be extended. After six months, consideration should be given to changing the individual's status from contingent to regular employee. When such changes occur, the individual is to fill out all applicable forms to complete the hiring process.

Any contingent worker is to be hired through an approved agency (e.g., a temporary agency, accounting firm, or consulting firm). An approved agency must be in compliance with all applicable employment laws, including but not limited to the completion of I-9 forms, compliance with discrimination laws, compliance with the Family and Medical Leave Act (FMLA), and compliance with wage and hour laws. The agency must also conduct an appropriate reference and background check.

Individuals who remain employees of the agency and do not become employees of the company are to comply with applicable company policies on harassment, discrimination, confidentiality, business use of facilities, parking, attendance, dress code, drug testing, performance, etc. Contingent workers who are not employees are to confirm in writing that they are not employees of the company, are not eligible for benefits, and are to comply with applicable company policies. When appropriate, the worker may be required to sign a non-disclosure agreement or other agreements.

Usually, a contingent worker who is not an employee of the company but is an employee of an agency will be covered by the workers' compensation policy of the agency, and the company will be treated as an additional insured under the agency's policy. The agency will be required to provide proof of workers' compensation coverage.

When an employment agency is the employer, it is to confirm in writing that it is responsible for correctly paying the contingent worker overtime, workers' compensation, vacation, and other benefits.

If the individual is to be an employee of the company, then the complete hiring package is to be completed (e.g., I-9 form, application, nondisclosure, conflict of interest, intellectual property agreement). The individual will be eligible for benefits based on hours worked. For example, contingent employees who work more than 1,000 hours in a year are eligible to enroll in the 401(k) plans.

To the extent that a contingent worker is eligible for FMLA leave as an employee of the agency, the company will cooperate with the agency in complying with FMLA. It is expected that the agency will supply another contingent worker at the same cost and with equal or better skills.

Even though equal opportunity laws may not apply to contingent workers, the company's equal opportunity policies, reasonable accommodation, and respect for dignity policies are to be applied.

Like all employees, any contingent employee and any independent contractor may be terminated at any time with or without cause and with or without notice.

Chapter # 16 Liability for Employee's Actions/Supervisory Responsibilities

Employer Liability for an Employee's Acts

If your employee hurts someone, you could be legally responsible

You might be responsible for harm caused by your employees. Under a handful of legal theories, courts have held employers liable for injuries their employees inflicted on coworkers, customers, or total strangers. Here, we explain those legal theories -- and a few common-sense steps you can take to steer clear of trouble.

Job-Related Accidents or Misconduct

Under a legal doctrine sometimes referred to as "respondeat superior" (Latin for "Let the superior answer"), an employer is legally responsible for the actions of its employees. However, this rule only applies if the employee is acting within the course and scope of employment. In other words, the employer will generally be liable if the employee was doing his or her job, carrying out company business, or otherwise acting on the employer's behalf when the incident took place.

The purpose of this rule is fairly simple: To hold employers responsible for the costs of doing business, including the costs of employee carelessness or misconduct. If the injury caused by the employee is simply one of the risks of the business, the employer will have to bear the responsibility.

But if the employee acted independently or purely out of personal motives, the employer might not be liable. Here are a few examples to illustrate the difference:

- A restaurant promises delivery in 30 minutes "or your next order is free." If a delivery person hits a pedestrian while driving frantically to beat the deadline, the company will probably be legally responsible for the pedestrian's injuries.
- A technology services company gives its sales staff company cars to make sales calls. After work hours, a sales person hits a pedestrian while using the company car to do personal errands. Most likely, the company will not be held responsible for the incident.
- A law firm issues cell phones to all of its lawyers, to allow them to call into the office and check in with clients when they in the field. A lawyer, when driving, hits a pedestrian because she is completely engrossed in her

telephone conversation with a senior partner in the firm. The law firm will probably be responsible for the pedestrian's injuries.

- A medical billing company hires a fumigator, who sprays the company's office with powerful pesticides. The next day, a dozen employees fall ill from the fumes. One of the affected employees is sent home. On her way home, she suffers a dizzy spell and hits a pedestrian. The company will probably be responsible

If you are sued under this legal theory of respondeat superior, your employee's victim generally won't have to show that you should have known your employee might cause harm, or even that you did anything demonstrably wrong. If your employee caused the injury while acting within the scope of employment.

Workers' compensation generally protects you from lawsuits by injured employees

If an employee injures a coworker while acting within the scope of employment, the coworker probably won't be able to sue the company. Instead, the coworker can make a workers' compensation claim to receive payment for lost wages, medical bills, and so on.

Employees can sometimes sue outside the workers' compensation system if his or her injuries were caused by their employers' intentional misconduct, but that generally won't be the case if they are hurt by another employee who is simply doing his or her job.

Careless Hiring and Retention

Under a different legal theory, someone who is injured by your employee can sue you for failing to take reasonable care in hiring your workers ("negligent hiring") continuing to employ them after learning the worker poses a potential danger ("negligent retention"). This rule applies even to what workers do outside the scope of employment -- in fact, it is often used to hold an employer responsible for a worker's violent criminal acts while working, such as rape, murder, or robbery.

However, under this theory you are legally responsible only if you acted carelessly -- that is, if you knew or should have known that an applicant or employee was unfit for the job, yet you did nothing about it.

Here are a few situations in which employers be held responsible:

- A pizza company hired a delivery driver without looking into his criminal past -- which included a sexual assault conviction and an arrest for stalking a woman he met while delivering pizza for another company. After he raped a customer, the pizza franchise was liable to his victim for negligent hiring.
- A car rental company hired a man who later raped a coworker. Had the company verified his resume claims, it would have discovered that he was in prison for robbery during the years he claimed to be in high school and college. The company was liable for the damages to the coworker.
- A furniture company hired a delivery man without requiring him to fill out an application or performing a background check. The employee assaulted a female customer in her home with a knife. The company was liable to the customer for negligent hiring

Avoiding Claims of Negligent Hiring or Retention

Many states have allowed claims for negligent hiring and negligent retention. Although these lawsuits have not yet appeared in every state, the clear legal trend is to allow injured third parties to sue employers for hiring or retaining dangerous workers.

Here are a few tips for prevention:

- **Perform background checks.** Make it your policy to run a routine background check before you hire an applicant. Verify information on resumes, look for criminal convictions (to the extent allowed in your state), and check driving records. These simple steps will weed out many dangerous workers and help you show that you were not careless in your hiring practices.
- **Use special care in hiring workers who will have a lot of public contact.** You are more likely to be held responsible for a worker's actions if the job involves working with the public. These workers all require more careful screening:
    - workers who go to a customer's home (to make deliveries, perform home repairs, or manage apartment buildings, for example)

- workers who deal with vulnerable people such as children, the elderly, or the disabled
- workers whose jobs give them access to weapons.

- **Identify problem employees immediately.** Under the theory of negligent retention, you can be responsible for keeping a worker on your payroll after you learn (or should have been aware) that the worker poses a potential danger. For example, if an employee has made violent threats against customers or brings an unauthorized weapon to work, you have to take immediate action

Chapter # 17 Unemployment Compensation and Worker's Compensation Insurance

L&I is a diverse state agency dedicated to the safety, health and security of Washington's 3.2 million workers. L&I helps employers meet safety and health standards and inspects workplaces when alerted to hazards. As administrators of the state's workers' compensation system, L&I is similar to a large insurance company. They provide medical and limited wage-replacement coverage to workers who suffer job-related injuries and illness. Their rules and enforcement programs also help ensure workers are paid what they are owed, that children's and teens' work hours are limited, and that consumers are protected from unsound building practices.

L&I serves customers in 20 offices throughout Washington, and has approximately 2,700 skilled employees, including safety inspectors, claims specialists, nurses, researchers, accountants, labor experts and support staff.

Protecting the health and safety of workers

L&I's Division of Occupational Safety and Health (DOSH) administers the Washington Industrial Safety and Health Act (WISHA) law by developing and enforcing rules that protect workers from hazardous job conditions. Their inspectors visit about 7,000 workplaces each year and cite businesses that violate health and safety rules. Each year, they also conduct about 2,500 free, on-site safety and health consultations for employers who request help complying with these rules in their unique workplaces. They also conduct research into workplace health and safety, which focuses on promoting healthy work environments and preventing workplace injuries and illnesses.

Protecting workers' wages, hours, breaks and more

L&I enforces child labor laws, as well as laws that protect workers' wages and working conditions. This agency also oversees apprenticeship programs and administers rules covering prevailing wage on public-works construction projects.

Protecting the public from unsafe work and economic hardship

L&I technical experts protect the public by inspecting electrical work, boilers, elevators and manufactured homes. They also test and license electricians, certify plumbers, and issue operating permits for amusement rides. In addition, the agency registers construction contractors, requiring them to be insured and bonded. L&I also provides an easy-to-use web site that allows customers to see whether a contractor is bonded and insured and alerts them to problems associated with hiring unregistered contractors.

Industrial Insurance or Workers Compensation

Industrial insurance coverage protects both workers and employers from the financial impact of a work-related injury or occupational disease.

It pays for an injured worker’s approved medical, hospital and related services that are essential to his/her treatment and recovery. An injured worker who is temporarily unable to work also receives partial wage replacement payments.

An employer or prospective employer must provide industrial insurance coverage for their employees. Coverage is mandatory. In return, they ordinarily cannot be sued for damages when a work-related injury or illness occurs.

Employers purchase coverage through the Department of Labor & Industries (L&I). L&I manages all claims and pays benefits out of an insurance pool called the Washington State Fund. The fund is financed by premiums paid by employers and employees, not by general revenue taxes.

However, employers may qualify for self-insurance if they demonstrate they have sufficient financial stability, an effective accident prevention program, and an effective administrative organization for an industrial insurance program.

Coverage and Exemptions

Property Management or Real Estate Agent?

Both RE Agents/Brokers and Property Management have some of the same duties and often an agency will provide both services. In this case the differences, for L&I purposes are as follows. If the person is a licensed RE agent, and oversees property (forms, rent, sales etc) this person is under the RE classification. However, if this person oversees or performs repair, care of units, cleaning, or supervising of on site management, they should be classified under the Property Management Classification.

Social Security

Most people who pay into Social Security work for an employer. Their employer deducts Social Security taxes from their paycheck, matches that contribution and sends taxes to the Internal Revenue Service (IRS) and reports wages to Social Security. But self-employed people must report their earnings and pay their taxes directly to IRS.

You are self-employed if you operate a trade, business or profession, either by - yourself or as a partner. You report your earnings for Social Security when you file your federal income tax return. If your net earnings are $400 or more in a year, you must report your earnings on Schedule SE in addition to the other tax forms you must file.

Paying Social Security and Medicare taxes

The Social Security tax rate for 2014 is 15.3 percent on self-employment income up to $106,800. If your net earnings exceed $106,800, you continue to pay only the Medicare portion of the Social Security tax, which is 2.9 percent, on the rest of your earnings

Social Security (OASDI) Program Rates & Limits	2014
Tax Rates (percent)	
Social Security (Old-Age, Survivors, and Disability Insurance)	
Employers and Employees, each [a]	6.20
Medicare (Hospital Insurance)	
Employers and Employees, each [a,b]	1.45
Maximum Taxable Earnings (dollars)	
Social Security	117,000
Medicare (Hospital Insurance)	No limit
Earnings Required for Work Credits (dollars)	
One Work Credit (One Quarter of Coverage)	1,200
Maximum of Four Credits a Year	4,800
Earnings Test Annual Exempt Amount (dollars)	
Under Full Retirement Age for Entire Year	15,480
For Months Before Reaching Full Retirement Age in Given Year	41,400

Social Security (OASDI) Program Rates & Limits	2014
Beginning with Month Reaching Full Retirement Age	No limit
Maximum Monthly Social Security Benefit for Workers Retiring at Full Retirement Age (dollars)	2,642
Full Retirement Age	66
Cost-of-Living Adjustment (percent)	1.5

a. Self-employed persons pay a total of 15.3 percent—12.4 percent for OASDI and 2.9 percent for Medicare.

b. This rate does not reflect the additional 0.9 percent in Medicare taxes certain high-income taxpayers are required to pay. See IRS information on this topic.

Supplemental Security Income (SSI) Program Rates & Limits	2014
Monthly Federal Payment Standard (dollars)	
Individual	721
Couple	1,082
Cost-of-Living Adjustment (percent)	1.5
Resource Limits (dollars)	
Individual	2,000
Couple	3,000
Monthly Income Exclusions (dollars)	
Earned Income [a]	65
Unearned Income	20
Substantial Gainful Activity (SGA) Level for the Nonblind Disabled (dollars)	1,070

a. The earned income exclusion consists of the first $65 of monthly earnings, plus one-half of remaining earnings.

Work credits

You need to have worked and paid Social Security taxes for a certain length of time to get Social Security benefits. The amount of time you need to work depends on your date of birth, but no one needs more than 10 years of work (40 credits).

If if your net earnings are $4,360 or more, you earn the yearly maximum of four credits—one credit for each $1,090 of earnings during the year. If your net earnings are less than $4,360, you still may earn credit by using the optional method described later in this fact sheet.
All of your earnings covered by Social Security are used to figure your Social

Security benefit. So, it is important that you report all earnings up to the maximum, as required by law.

Figuring your net earnings

- Net earnings for Social Security are your gross earnings from your trade or business, minus your allowable business deductions and depreciation. Some income does not count for Social Security and should not be included in figuring your net earnings: Dividends from shares of stock and interest not count for Social on bonds, unless you receive them as a dealer in stocks and securities;
- Interest from loans, unless your business is lending money;
- Rentals from real estate, unless you are a real estate dealer or regularly provide services mostly for the convenience of the occupant; or
- Income received from a limited partnership.

How to report earnings

You must complete the following federal tax forms by April 15 after any year in which you have net earnings of $400 or more:

- Form 1040 (*U.S. Individual Income Tax Return*);
- Schedule C (*Profit or Loss from Business*) or Schedule F (*Profit or Loss from Farming*) as appropriate; and
- Schedule SE (*Self-Employment Tax*).

You can get these forms from IRS and most banks and post offices. Send the tax return and schedules along with your self-employment tax to IRS.

Even if you do not owe any income tax, you must complete Form 1040 and Schedule SE to pay self-employment Social Security tax. This is true even if you already get Social Security benefits.

Family business arrangements

Family members may operate a business together. For example, a husband and a wife may be partners or run a joint venture. If you operate a business together as partners, you should each report your share of the business profits as net earnings on separate self-employment returns (Schedule SE), even if you file a joint income tax return. The partners must decide the amount of net earnings each should report (for example 50 percent and 50 percent).

Chapter # 18 Other topics (i.e., Discrimination Claims, Sexual Harassment, and Privacy, Mediation and Arbitration of Disputes)

Privacy issues

Employers want to be sure their employees are doing a good job, but employees don't want their every sneeze or trip to the water cooler logged. That's the essential conflict of workplace monitoring.

New technologies make it possible for employers to monitor many aspects of their employees' jobs, especially on telephones, computer terminals, through electronic and voice mail, and when employees are using the Internet. Such monitoring is virtually unregulated. Therefore, unless company policy specifically states otherwise (and even this is not assured), your employer may listen, watch and read most of your workplace communications.

Recent surveys have found that a majority of employers monitor their employees. They are motivated by concern over litigation and the increasing role that electronic evidence plays in lawsuits and government agency investigations.

A 2005 survey by the American Management Association found that three-fourths of employers monitor their employees' web site visits in order to prevent inappropriate surfing. And 65% use software to block connections to web sites deemed off limits for employees. About a third track keystrokes and time spent at the keyboard. Just over half of employer's review and retain electronic mail messages.

Over 80% of employers disclose their monitoring practices to employees. And most employers have established policies governing Internet use.

Telephone Monitoring

Can an employer listen to phone calls at work?

In most instances, yes. For example, employers may monitor calls with clients or customers for reasons of quality control. However, when the parties to the call are all in California, state law requires that they be informed that the conversation is recorded or monitored by either putting a beep tone on the line or playing a recorded message. Not every business is aware of this requirement, so your calls might still be monitored without a warning. Federal law, which regulates phone calls with persons outside the state, does allow unannounced monitoring for business-related calls. An important exception is made for personal calls. Under federal case law, when an employer realizes the call is personal, he or she must immediately stop monitoring the call. However, when employees are told not to make personal calls from specified business phones, the employee then takes the risk that calls on those phones may be monitored.

Privacy Tip*:* The best way to ensure the privacy of personal calls made at work is to use ones' own mobile phone, a pay phone, or a separate phone designated by the employer for personal calls.

If headsets are used, are these conversations with co-worker's subject to monitoring?

Yes. The conversations one has with co-workers are subject to monitoring by an employer in the same way that conversations with clients or customers are. If headsets are worn, the same care should be used as when speaking to a customer or client on the phone. Some headsets have "mute" buttons which allow the transmitter to be turned when the telephone is not being used.

Can the employer obtain a record of employees' phone calls?

Yes. Telephone numbers dialed from phone extensions can be recorded by a device called a pen register. It allows the employer to see a list of phone numbers dialed by your extension and the length of each call. This information may be used to evaluate the amount of time spent by employees with clients.

Employers often use pen registers to monitor employees with jobs in which telephones are used extensively. Frequently, employees are concerned that the information gathered from the pen register is unfairly used to evaluate their efficiency with clients without consideration of the quality of service.

Computer Monitoring

If an employee has a computer terminal at their job, it may be the employer's window into their workspace. There are several types of computer monitoring.

Employers can use computer software that enables them to see what is on the screen or stored in the employees' computer terminals and hard disks. Employers can monitor Internet usage such as web-surfing and electronic mail.

People involved in intensive word-processing and data entry jobs may be subject to keystroke monitoring. These systems tell the manager how many keystrokes per hour each employee is performing. It also may inform employees if they are above or below the standard number of keystrokes expected. Keystroke monitoring has been linked with health problems including stress disabilities and physical problems like carpal tunnel syndrome.

Another computer monitoring technique allows employers to keep track of the amount of time an employee spends away from the computer or idle time at the terminal.

Is an employer allowed to see what is on an employees' terminal while they are working?

Generally, yes. Since the employer owns the computer network and the terminals, he or she is free to use them to monitor employees. Employees are given some protection from computer and other forms of electronic monitoring under certain circumstances. Union contracts, for example, may limit the employer's right to monitor. Also, public sector employees may have some minimal rights under the United States Constitution, in particular the Fourth Amendment which safeguards against unreasonable search and seizure.

How to tell if monitoring is happening at a terminal.

Most computer monitoring equipment allows employers to monitor without the employees' knowledge. However, some employers do notify employees that monitoring takes place. This information may be communicated in memos, employee handbooks, union contracts, at meetings or on a sticker attached to the computer.

In most cases, employees find out about computer monitoring during a performance evaluation when the information collected is used to evaluate the employee's work.

Electronic Mail and Voice Mail

Is electronic mail private? What about voice mail?

In most cases, no. If an electronic mail (e-mail) system is used at a company, the employer owns it and is allowed to review its contents. Messages sent within the company as well as those that are sent from your terminal to another company or from another company to you can be subject to monitoring by your employer. This includes web-based email accounts such as Yahoo and Hotmail as well as instant messages. The same holds true for voice mail systems. In general, employees should not assume that these activities are not being monitored and are private. Several workplace privacy court cases have been decided in the employer's favor.

When messages are deleted from a terminal, are they still in the system?

Yes. Electronic and voice mail systems retain messages in memory even after they have been deleted. Although it appears they are erased, they are often permanently "backed up" on magnetic tape, along with other important data from the computer system.

When an employer's electronic mail system has an option for marking messages as "private." Are those messages protected?

In most cases, no. Many electronic mail systems have this option, but it does not guarantee messages are kept confidential. An exception is when an employer's written electronic mail policy states that messages marked "private" are kept confidential. Even in this situation, however, there may be exceptions.

Is there ever a circumstance in which my messages are private?

Some employers use encryption to protect the privacy of their employees' electronic mail. Encryption involves scrambling the message at the sender's terminal, then unscrambling the message at the terminal of the receiver. This ensures the message is read only by the sender and his or her intended recipient. While this system prevents co-workers and industrial "spies" from reading your electronic mail, your employer may still have access to the unscrambled messages.

Are text messages on an employer-provided cell phone private?

In an opinion issued on June 18, 2008, the 9th U.S. Circuit Court of Appeals ruled that employers must have either a warrant or the employee's permission to see cell phone text messages that are not stored by the employer or by a company that is paid by the employer for storage. While e-mail typically is stored on a company's own servers, text messages usually are stored by cell phone companies and the employer does not directly pay for their storage.

What about my employer's promises regarding e-mail and other workplace privacy issues. Are they legally binding?

Not necessarily. Usually, when an employer states a policy regarding any issue in the workplace, including privacy issues, that policy is legally binding. Policies can be communicated in various ways: through employee handbooks, via memos, and in union contracts. For example, if an employer explicitly states that employees will be notified when telephone monitoring takes place, the employer generally must honor that policy. There are usually exceptions for investigations of wrong-doing. Therefore, it is a good idea to become informed.

Currently there are very few laws regulating employee monitoring. If you are concerned about this issue, contact your federal legislators, especially the members of the House and Senate Labor committees in Congress.

Business Ethics

While it is difficult to monitor everything, employees do—both on and off the job—many employers discourage unethical activities by establishing business ethics policies on what is and what is not considered “ethical” in the business context.

Business ethics can be defined as written and unwritten codes of principles and values that govern decisions and actions within a company. In the business world, the organization’s culture sets standards for determining the difference between good and bad decision making and behavior.

In the most basic terms, a definition for business ethics is knowing the difference between right and wrong and choosing to do what is right. The phrase 'business ethics' can be used to describe the actions of individuals within an organization, as well as the organization.

Sometimes the line is a fine one. Moonlighting, for example, is widely accepted in some industries. But what if an employee is working on the side for a company that is engaged in a line of business similar to (or in direct competition with) the primary employer's? A good policy statement is the best way to let employees know where the boundaries between acceptable and unacceptable behavior lie.

Some issues might be:

- Employment by other companies.
- Amount of the gift.
- Fictitious names.
- Illegal practices
- Documents.
- Discounts
- Business interests. (investments).
- Use of company facilities.
- Misuse of confidential information. (privacy)
- Harassment.
- Other conflicts of interest.
- Coordination with other policies. (Sarbanes-Oxley Act.)
-

Mediation

Mediation is a form of Alternative Dispute Resolution (ADR) that is offered by the U.S. Equal Employment Opportunity Commission (EEOC) as an alternative to the traditional investigative or litigation process. Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary and negotiated resolution. The decision to mediate is completely voluntary for the charging party and the employer. Mediation gives the parties the opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into resolutions. A mediator does not resolve the charge or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. The mediation process is strictly confidential. Information disclosed during mediation will not be revealed to anyone.

Arbitration is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators", or "arbitral tribunal") whose decision (the "award") they are bound. Arbitration, in the United States and in other countries, often includes alternative dispute resolution (ADR), a category that more commonly refers to mediation (a form of settlement negotiation facilitated by a neutral third party). It is more helpful, however, simply to classify arbitration as a form of binding dispute resolution, equivalent to litigation in the courts, and entirely distinct from the various forms of non-binding dispute resolution, such as negotiation, mediation, or non-binding determinations by experts. Today, arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions and sometimes used to enforce credit obligations. It is also used in some countries to resolve other types of disputes, such as labor disputes, consumer disputes or family disputes, and for the resolution of certain disputes between states and between investors and states.

Please take your final exam now.