Chapter 22

EMPLOYMENT AND IMMIGRATION LAW IN THE COLORADO CONSTRUCTION INDUSTRY

Thomas "Tobie" Hazard, Esq., Editor and Authors (2003, 2005 & 2007 Supplements)
Holland & Hart LLP

Christopher L. Thomas, Esq., Editor and Author (2007 Supplement)
Holland & Hart LLP

SYNOPSIS

§ 22.1 • INTRODUCTION

Federal and state statutes regulate almost every aspect of the employment relationship. In addition, Colorado common law has expanded to a great extent in the past several decades, providing employees with greater workplace protections and, therefore, more grounds on which employees may sue. Although there are many potential legal pitfalls or challenges for employers in the construction industry to consider, if employers keep in mind a few key rules regarding hiring, managing, and firing employees, they may avert many legal challenges or, at least, defend against them more successfully. The following sections describe the general rules and principles that govern most workplaces in Colorado. This Chapter concludes with a discussion of immigration law, a topic of increasing concern to employers both here and throughout the country.

§ 22.2 • AT-WILL EMPLOYMENT AND ITS EXCEPTIONS

§ 22.2.1—At-Will Employment

The traditional rule in Colorado is that, absent an agreement stating otherwise, the relationship between an employer and employee is "at-will," meaning that, absent a specific term of employment, either the employer or the employee may terminate the employment relationship at

any time with or without notice or cause.[1] Obviously, this doctrine provides both the employer and employee great flexibility.

Over the last several decades, Colorado has recognized several exceptions to the "at-will" doctrine, permitting employees to sue on a variety of theories of "wrongful discharge." Wrongful discharge claims most often are brought on theories of breach of an express or an implied contract, promissory estoppel, or discharge in violation of public policy claims. Under contract or promissory estoppel theories, former employees may claim that they entered into an employment agreement with their employer that their former employer breached, or that their employer made promises to them that it did not keep when it discharged the employee. As evidence of these alleged promises, employees often point to employee handbooks, employment applications, or other written policy manuals and materials. In some instances, former employees may allege that they were wrongfully discharged in violation of public policy because they refused to do something illegal on the employer's behalf, or because they exercised a protected right. In addition, they may allege other tort claims, such as intentional infliction of emotional distress or misrepresentation.

It is important to understand that although the "at-will" doctrine has not been completely supplanted by a "for cause" standard, it is difficult for employers to defend wrongful discharge suits on the theory that they were free to let the employee go without cause. Jurors tend not to be sympathetic to an employer that discharged a good employee as a mere exercise of its "at-will" right. Therefore, as a practical matter, the employer must be ready to prove that it had sound business reasons for terminating the employee.

§ 22.2.2—At-Will Exception: Implied Contracts And Promissory Estoppel

In *Continental Air Lines, Inc. v. Keenan*,[2] the Colorado Supreme Court held that the presumption of at-will employment is rebuttable under certain circumstances, particularly when an employer promulgates termination policies that suggest the employee is not employed at the will of the company. In the wake of *Keenan*, countless employees have sued their former employers under a theory of breach of contract for allegedly failing to follow an employee termination (or other) policy. According to the *Keenan* decision, an employee may pursue relief under two possible theories: an implied contract or promissory estoppel. Under the implied contract theory, an employee normally claims to be entitled to relief because the employer, by promulgating certain termination procedures, allegedly was making an offer to the employee of continuing employment, and the employee's initial or continued employment constituted acceptance and consideration of those procedures, thereby forming a contract of employment between the employer and employee. Alternatively, under a promissory estoppel theory, an employee may be entitled to relief if he or she can demonstrate that the employer reasonably should have expected the employee to consider the employee discipline or termination policy as a commitment from the employer to follow those procedures, that the employee reasonably relied on those procedures to his or her detriment, and that injustice can be avoided only by enforcement of the procedures.[3] As a result, it is vital for Colorado employers to review the wording of their employee handbooks to avoid mandatory language implying that a certain procedure must be followed or that any reason must exist before termination or discipline can occur. Likewise, it is important to delete other refer-

ences in personnel materials that imply that an employee is not employed at the will of the company, such as referring to employees as "permanent."

Generally, Colorado's three-year statute of limitations applies to such claims.[4] For civil actions filed before July 1, 2004, a plaintiff who prevails on a breach of contract claim can recover not only economic damages, but also emotional distress damages where the breach is willful and wanton.[5] However, for civil actions filed on or after July 1, 2004, emotional distress damages are recoverable only if specifically authorized by the employment contract.[6] As to damages available to a prevailing plaintiff on a promissory estoppel claim, the law is unclear. The Colorado Supreme Court has held that in promissory estoppel cases, "full-scale enforcement by normal [contract] remedies is appropriate."[7] However, in an earlier decision, the Colorado Supreme Court has stated that "promissory estoppel is not defined totally in terms of contract principles," and that remedies "may be limited as justice requires."[8] Whether emotional distress damages are available by a prevailing plaintiff in a promissory estoppel case has not been addressed.

One of the best defenses against an implied contract/promissory estoppel type of wrongful discharge claim is an express, written disclaimer stating that the employee handbook, and any other policy statements by the employer such as employment applications or procedure rules, do not change the employee's at-will status. Such clear and conspicuous disclaimers can show that an employer did not intend to create a contract, and that the employee could not reasonably rely on statements of the employer as an enforceable contract or promise.[9] Carefully drafted handbooks that expressly state that the policies are not intended to create an employment agreement and that expressly reserve the right of the employer to modify or rescind any policy are critical to preserving the at-will status of employees. Such disclaimers — which should be set forth in a conspicuous way, preferably in bold print at the beginning of the handbook — should be used in all handbooks, policy manuals, or other employment-related policy statements. In addition, it is helpful to insert such a statement on application forms. It is also vital to have an employee sign an acknowledgement form repeating the disclaimer language at the time that the employee receives a copy of the materials.

§ 22.2.3—At-Will Exception: Wrongful Discharge Against Public Policy

The Colorado Supreme Court adopted the public policy exception to the at-will doctrine in *Martin Marietta Corporation v. Lorenz*.[10] In so ruling, the court held that the employee may be entitled to relief from a discharge if he or she can show

> [1] that the employer directed the employee to perform an illegal act as part of the employee's work-related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; [2] that the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's right or privilege as a worker; and [3] that the employee was terminated as the result of refusing to perform the act directed by the employer.[11]

In the construction industry, such claims may arise when an employee says that he or she was fired for refusing to do something fraudulent or of a criminal nature. Public policy types of claims also may arise when a former employee alleges that he or she was fired in retaliation for exercising a job-related right, such as filing a workers' compensation claim or complaining of wage and hour violations.[12]

Since the Colorado Supreme Court recognized the public policy exception to the at-will doctrine in 1992, plaintiffs' lawyers have tested the limits of the exception by bringing creative public policy wrongful discharge claims. Recent indications from the Colorado courts, however, suggest that the courts may be unwilling to further expand the exception.[13] Furthermore, where a statute or regulation provides its own remedies for an aggrieved employee, such statute or regulation cannot be relied on to state a wrongful discharge against public policy claim.[14]

Public policy wrongful discharge claims are tort claims, subject to Colorado's two-year statute of limitations.[15] Because a wrongful discharge in violation of public policy sounds in tort, a full range of tort damages is available to prevailing plaintiffs, including damages for wage and benefit loss (both front pay and back pay) and compensatory damages for economic losses, such as job search expenses.[16] Non-economic compensatory damages and punitive damages may also be recoverable.[17]

Where an employee is party to a collective bargaining agreement (CBA), he or she may not assert a claim for wrongful termination in violation of public policy.[18] The rationale for this rule is that the public policy exception only protects at-will employees who can be terminated for any reason. "Where an employee enjoys a remedy pursuant to a CBA (*i.e.*, that he can only be fired for just cause), 'the societal interest can be protected by asserting retaliatory discharge in the grievance process, and we should not permit avoidance of the collective bargaining grievance process by an independent action.'"[19]

§ 22.2.4—At-Will Exception: Express And Implied Covenants Of Good Faith And Fair Dealing

The covenant of good faith and fair dealing is a promise by a party to treat another fairly and in good faith. The covenant can arise either expressly or implicitly. In the former situation, it can be an express agreement, where the parties agree to treat each other fairly in all matters relating to the contract. In the latter situation, while there is no express promise to treat each other fairly, the covenant of good faith and fair dealing arises by implication out of the relationship between the parties when the performance of the parties allows for discretion on the part of either party.

Although the law is not clear, an employer's express promise of fair treatment may give rise to a claim of breach of an express covenant of good faith and fair dealing in certain employment situations.[20] With the law uncertain, employers should train their supervisors — regardless of how cynical it may sound — to be fair, but not promise to be fair.

While the implied covenant of good faith and fair dealing is recognized in many commercial contexts, the Colorado Supreme Court has declined to recognize the concept in the employment context.[21]

Still uncertain is what statement will constitute an express covenant of good faith and fair dealing. The covenant of good faith and fair dealing does not inject new substantive terms into a contract or change its existing terms.[22] Therefore, if the contract between the employer and employee provides that the employer may terminate the employee with or without cause, unless there is an express or implied promise limiting that right, the covenant of good faith and fair dealing does not restrict that right in the at-will employment context.[23]

Furthermore, general statements in employer's policies to treat employees "fairly" have been held too indefinite to support an express covenant of good faith and fair dealing.[24] Although no Colorado appellate court has addressed whether written disclaimers may bar a breach of an express covenant of good faith and fair dealing, the claim is a contract-like claim.[25] As a result, the claims should be barred where an express statement disclaims any intent to change the employee's "at-will" status.[26] Wise employers should therefore state in their disclaimers that statements of fair treatment are a goal only, and not enforceable as a contract or covenant.

§ 22.3 • FEDERAL AND STATE ANTI-DISCRIMINATION LAWS

§ 22.3.1—Federal Anti-Discrimination Laws

Absent an agreement stating otherwise, the relationship between an employer and employee in Colorado is presumed to be at-will. This means that either party to an employment at-will relationship may terminate the employment for any cause or no cause, except for an illegal reason. An illegal reason would include terminating an employee on the basis of the employee's membership in a class protected by federal or state anti-discrimination laws.

Federal anti-discrimination laws include:

- Title VII of the Civil Rights Act of 1964,[27] which prohibits discrimination in employment based on an individual's race, color, religion, sex, or national origin.
- Section 1981,[28] which prohibits discrimination based on race or ethnicity in the making, performance, and termination of contracts, including employment contracts.
- Age Discrimination in Employment Act of 1967,[29] which prohibits discrimination against persons age 40 and older.
- Americans with Disabilities Act of 1990,[30] which, among other things, prohibits employment discrimination based on disability.
- Equal Pay Act of 1963,[31] which prohibits employers to pay different rates of pay based on gender to employees performing the same work.

Employers should note that there are two theories of liability under most federal discrimination laws: disparate treatment and disparate impact. Disparate treatment arises due to intentional discrimination, when an employee has been treated adversely because of his or her protected class status. Disparate impact, on the other hand, arises when an employer's neutral policy places a greater burden on, or adversely affects, a protected class.[32] As a result, it is important to implement workplace policies that treat employees even handedly, and that do not have a disproportionate effect on protected class members.

Furthermore, most federal anti-discrimination laws prohibit retaliation against an employee or applicant because he or she has opposed any unlawful practice covered by the statute or because he or she has made a charge, testified, or otherwise participated in an investigation, proceeding, or hearing related to a discriminatory practice.[33] In construing the anti-retaliation provisions of Title VII, the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway v. White*[34] held that to state a cognizable claim of retaliation at least under Title VII of the Civil Rights Act of 1984, all the employee must show is "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[35] In so holding, the Supreme Court rejected a standard for retaliation claims requiring the employee to show an "ultimate employment" decision — *i.e.*, termination — to support a retaliation claim and instead adopted a standard requiring an action sufficiently detrimental to the employee that it would likely dissuade a reasonable worker from making or supporting a charge of discrimination. In other words, trivial harms to the employee will not trigger employer liability under the anti-retaliation provisions of Title VII; however, significant harms — even short of discharge — may trigger unlawful retaliation liability. Whether this new standard for retaliation claims under federal statutes will be followed outside of Title VII remains to be seen.

§ 22.3.2—Colorado Anti-Discrimination Act

Colorado has its own anti-discrimination statute that mirrors the protections provided by federal law in most respects. The Colorado Anti-Discrimination Act (CADA),[36] however, is much broader than federal anti-discrimination laws in its coverage of employers. Employers covered under the CADA include the State of Colorado, all political subdivisions, school districts, employment agencies, labor organizations, apprenticeship training programs, as well as "every other person employing persons within the state."[37] Accordingly, the CADA applies to employers with two or more employees.

Moreover, the CADA includes three protections not found in federal anti-discrimination laws. First, with limited exceptions, employers may not discharge an employee, or refuse to hire a person, solely on the basis that that person is married to or plans to marry another employee.[38] The exceptions are if one spouse has a supervisory role over the other; if one spouse is entrusted with monies received or handled by the other spouse; or if one spouse has access to the employer's confidential information, including payroll and personnel records.[39]

Second, the CADA makes it a discriminatory practice for employers to terminate an employee due to that employee's involvement in any off-duty, off-premises lawful activity, unless

the restriction relates to a bona fide occupational requirement or is reasonably and rationally related to job performance or is necessary to avoid a conflict of interest.[40] While initially conceived to protect smokers, outspoken advocates of unpopular causes, and persons who failed drug tests due to their off-duty use of alcohol or prescription drugs, have used the statute to challenge their discharge based on lawful, off-duty conduct.[41] Unlike other provisions of the CADA, the aggrieved employee may bring a civil action against the employer without first filing a charge with the Colorado Civil Rights Division.[42] While the law originally provided for an award of costs and attorney fees to the prevailing party, the statute was amended in 2007 to provide that only prevailing employees may recover their attorney fees.[43]

Third, in 2007 the CADA was amended to prohibit workplace discrimination against gays, lesbians, bisexuals, and transgendered individuals.[44] In passing the new law, Colorado joins a growing number of states that protect against job bias based on sexual orientation and gender identity.

§ 22.3.3—Avoiding Discrimination Claims In Hiring

Discrimination issues arise frequently in the hiring context, and employers must be mindful to focus their hiring questions on a person's ability to do the job, not the protected class characteristic. The following sections summarize some of the more common issues.

Age, Date of Birth Discrimination

Normally, pre-employment questions about a prospective employee's age or date of birth are inappropriate under the Age Discrimination in Employment Act and the CADA. However, it is permissible to ask an applicant to disclose his or her age if the applicant appears to be under 18 years of age and age is a bona fide occupational qualification. In addition, if an employer needs an employee's date of birth for administrative reasons (such as for pension purposes), this information may be obtained after the person is hired.

Race, Religion, National Origin Discrimination

Title VII of the Civil Rights Act and the CADA prohibit discrimination based on race, religion, and national origin. Questions relating to a person's race, ethnicity, or religion are invitations to discrimination claims. Indeed, a requirement that an applicant furnish a picture has been used to support a claim for race discrimination, when the employee proved the photograph was required so the employer could identify minority applicants.[45] Employers should also be wary of qualifications that may seem race-neutral, but may have a disparate impact on certain groups. For instance, one court has ruled that a no-beard policy may have an unlawful disparate impact on African-American males.[46] Religious discrimination claims arise often in the context of an employee scheduling time off or requesting to wear religious garb. Title VII requires that employers make at least a minimal reasonable accommodation for such requests, unless the accommodation would impose an undue hardship.[47]

Physical Traits, Disability Discrimination

The Americans with Disabilities Act and the CADA prohibit disability-based discrimination. Of particular importance to construction employers, the Americans with Disabilities Act lim-

its the kinds of medical examinations and inquiries an employer may conduct before an employee is hired. At the pre-offer stage, employers may not ask any questions about disabilities, including questions about how the employee became disabled, the prognosis for the disability, or how often the applicant would require leave for treatment for a disability. Employers may, however, ask questions about an applicant's ability to perform job-related functions, including the applicant's ability to meet attendance requirements. Physical agility tests may be administered as long they are given to all similarly situated applicants for the position.[48]

After a bona fide job offer has been made, an employer may condition employment on the employee's satisfactory results of a medical examination.[49] The examination must be given to all entering employees in that particular job category, regardless of whether they have a disability. If a job offer is withdrawn because of the examination results, the employer must be able to show that the examination criteria are necessary to performing the job and that the applicant could not perform the job even with reasonable accommodation.[50] All medical information obtained from the medical examination should be kept in a separate file and treated as confidential.[51] Supervisors may be informed of necessary restrictions or accommodations learned of from the examination.[52]

C.R.S. § 10-3-1104.5 provides that no person can require an applicant to submit to an HIV-related test without written informed consent. In addition, no person can disclose HIV-related test results without obtaining separate, written informed consent.

In addition to potentially offensive questions, employers should be careful about job requirements that disparately impact protected class members, such as height and weight requirements.

Sex, Marital, and Family Status

Questions about an applicant's marital and family status tend to have very little relevance to the central functions of a job, and are viewed with suspicion. Questions concerning child-care arrangements are generally improper, and suggest sex discrimination. Personal questions about an applicant's intentions as to childbearing are similarly improper. If there are workplace dangers that might affect an individual's fertility, an employer should warn the applicant of the potential danger, but leave the decision to that person. If information about a person's gender, marital status, and family status is needed for benefit or tax purposes, it may be obtained after the applicant has been hired.

Arrest, Conviction Records

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the federal anti-discrimination laws, takes the position that questions concerning arrests are improper unless the applicant is being considered for a "security-sensitive" job and the employer does an investigation to determine, in effect, whether the applicant likely committed the crime for which he or she was arrested.[53] The EEOC guidelines also provide that questions about an applicant's conviction record are improper unless the employer can show that the conviction is in some way related to the position being applied for.[54] The reasoning behind the EEOC's position is based on statistics that show that certain minorities are arrested and convicted at considerably higher rates than non-minorities.

As a practical matter, many Colorado employers inquire about convictions for safety reasons. If the employer uses an outside firm to conduct a background check of an applicant — including a check of prior convictions — the employer should first obtain the applicant's written consent to the background check and comply with all notice requirements of the Fair Credit Reporting Act when rejecting any applicant based on the background check.[55]

Garnishment

Questions concerning whether an applicant has been the subject of garnishment proceedings should be eliminated from application forms and job interviews, as the relevance of such questions to an employee's ability to perform a job is not apparent and reliance on them may be discriminatory.[56]

Citizenship

The anti-discrimination provision of the Immigration Reform and Control Act provides that an employer cannot discriminate against non-U.S. citizens.[57] With certain limited exceptions, private employers cannot preclude lawful aliens from their work force. Inquiries about an applicant's citizenship should be deleted from employment applications, although it is proper to ask whether an applicant may lawfully work in the U.S.

Other Problem Areas

If a question does not specifically relate to a job requirement of a position, the employer should consider why it is making such an inquiry. If there is some business justification for seeking the information, the employer should evaluate that need against the potential for discrimination claims. Employers who have homogenous, predominately white work forces should be careful about giving preference to applicants who have friends and families who already work for the same employer, to avoid claims of race discrimination. Questions concerning credit ratings or credit references have been found to be discriminatory against minorities and women. While questions about military experience or training are permissible, questions about the type or circumstances of a person's discharge are not appropriate.

It is important to keep in mind that questions that should not be asked on applications likewise should not be asked during an interview.

§ 22.3.4—Sexual Harassment And Hostile Work Environment

A subset of gender discrimination is sexual harassment, which is also prohibited by Title VII. Conduct that may constitute sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other sexual verbal or physical conduct. In any industry, sexual harassment is especially problematic if the offending behavior is done by a supervisor. According to the U.S. Supreme Court, if an employee can show that he or she suffered a *tangible employment action* because of a supervisor's sexually harassing conduct, then the employer will be strictly liable for the harassment.[58] Tangible employment action includes firing, demotion, reducing an employee's compensation, withholding raises or promotions, reassigning the employee with significantly different job responsibilities or reducing job responsibilities, changing benefits significantly, diminishing a job title, and making working conditions so bad that an employee feels reasonably compelled to resign.

If no adverse employment action has been taken, an employer may not be liable if (1) the employer exercised reasonable care to prevent and promptly correct the sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of the prevention and corrective procedures.[59] If those two conditions are not met, the employer will be liable for its supervisors' conduct, even though it was unaware of the existence of the sexually harassing conduct.[60] Thus, employers should develop sexual harassment policies and make sure they are distributed to all employees. When a complaint is made, an immediate investigation must be conducted, and, if necessary, corrective action must be taken.

In another Supreme Court decision, *Oncale v. Sundowner Offshore Services, Inc.*,[61] Title VII's prohibition against sexual harassment in the workplace was held to apply even when the harasser and the harassed employee were of the same sex. In *Oncale*, the Court struggled to emphasize that Title VII does not prohibit all crude behavior in the workplace; rather, it is specifically limited to discrimination that occurs "because of . . . sex." Further, the Court held that the prohibition of harassment on the basis of sex "requires neither asexuality nor androgyny in the workplace; it forbids only behavior so *objectively offensive* as to alter the 'conditions' of the victim's employment."[62] The Court's opinion does not provide much guidance to employers regarding the contours of a same-sex sexual harassment claim, suggesting only that the severity and the pervasiveness of the conduct, with "appropriate sensitivity to social context," will help courts and juries distinguish between simple teasing or roughhousing and discrimination.[63] The Court has essentially left the work of defining the standards to the lower courts.

Claims of illegal harassment or a hostile work environment are not limited to those based on gender or sex. Courts have recognized claims of hostile work environment based on race or national origin,[64] age,[65] disability,[66] and other protected characteristics.[67] To protect the company from liability for such conduct, employers should adopt the following practices:

- Establish and enforce an anti-harassment policy and complaint procedure.
- Distribute a copy of the policy to all employees. Each employee should sign a form acknowledging that he or she has received the policy and understands its contents.
- The policy should be distributed periodically, as well as posted on all bulletin boards. Copies should be available in all locations where employee information and forms are kept.
- Train your supervisors and employees at least annually on the anti-harassment policy generally and sexual harassment specifically. Training must go beyond merely reading the policy to employees.
- Supervisors must be informed of their unique responsibilities to respond to any harassing conduct they observe, even without a complaint. Also, they should know that their conduct will be subject to greater scrutiny and could easily lead to liability for the employer.

§ 22.4 • MISCELLANEOUS WORKPLACE CLAIMS

§ 22.4.1—Defamation And Reference Checks

Defamation is a common law tort based on the alleged publication of false or derogatory statements about a person. If an employer makes a false statement of fact about an employee that tends to injure the employee's reputation, and that statement is published to a third person, the employee may state a claim for defamation. False statements about a person's ability to perform his or her jobs are *per se* defamatory, which means that damages are presumed. Libel pertains to written statements,[68] and slander pertains to oral statements.[69]

Defamation is a particular risk whenever an employer makes statements about an employee. For instance, employee performance evaluations, job references, and statements to co-workers about another employee's termination all may set the stage for potential defamation claims. There are, however, a number of defenses available to employers.

Truth is an absolute defense.[70] However, in the employment context, truth can be a difficult defense to prove. For instance, it is difficult to prove that an employee was "dishonest" or that he or she "falsified a time record."

The qualified privilege defense is a more accessible and often more appropriate defense. The qualified privilege protects an employer's negative remarks about an employee, with certain limitations.[71] The employer must have a legitimate interest in the subject of the statements; the statements can only be made to others having a legitimate interest in the subject matter; and the employer's statements must be made in good faith and without malice. The privilege can be lost if an employer abuses it. For instance, if an employer widely publishes the reasons an employee was fired to co-workers who have no need to know, the employer might be deemed to have exceeded the scope of the privilege.[72]

In Colorado, C.R.S. § 8-2-114(2) protects employers to some extent when giving references about former employees. Under that statute, a Colorado employer that provides fair and unbiased information about a current or former employee's job performance is presumed to be acting in good faith and is immune from civil liability for such disclosure and the consequences of such disclosure. The presumption of good faith may be rebutted upon a showing by a preponderance of the evidence that the information disclosed was knowingly false, deliberately misleading, disclosed for a malicious purpose, or violative of a civil right of the employee. An employer that provides written information to a prospective employer about a current or former employee must, if requested, send a copy of the information to the last known address of the person who is the subject of the reference.[73]

Although this statute provides some protection for employers, the issues of what may be considered "fair and unbiased information" and "acting in good faith" are fact issues that often must be decided by a jury. As a result, the safest approach is to have a waiver and release form signed by the employee, releasing both the prospective employer and former employer from any liability for requesting or providing references.

§ 22.4.2—Invasion Of Privacy

A defamation claim, by definition, involves false statements by an employer about an employee or former employee. By contrast, an employer may get into hot water if the statements are true, place the person in a bad light, and the publication was made with actual malice. In that case, sometimes an employee may sue under the tort of invasion of privacy.

In Colorado, invasion of privacy encompasses three separate torts: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; and (3) unreasonable publicity given to another's private life.[74]

In 1997, in *Borquez v. Robert C. Ozer, P.C.*,[75] the Colorado Supreme Court recognized a claim for invasion of privacy based on unreasonable publicity concerning an employee's private life. To prevail on such a claim, a party must meet the following requirements:

> (1) the fact or facts disclosed must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be one which would be highly offensive to a reasonable person; (4) the fact or facts disclosed cannot be of legitimate concern to the public; and (5) [the party who made the disclosure] acted with reckless disregard of the private nature of the fact or facts disclosed.[76]

In the *Borquez* case, the Colorado Supreme Court held that a plaintiff may prevail only if the employer had disclosed private information to a large number of persons or the general public. Nonetheless, employers should still proceed with caution, because the court noted that public disclosure may occur when an individual merely initiates a process whereby the information is eventually disclosed to a large number of persons.[77] As a result, the familiar rule of disclosing private information only to those with a need to know the information still applies.

In July 1998, the Colorado Court of Appeals recognized an invasion of privacy claim based on a theory of unreasonable intrusion upon seclusion of another in *Doe v. High-Tech Institute*.[78] In that case, a student in a medical assistant training program told his supervisor that he had tested positive for HIV, and asked that the information be treated as confidential. Later that month, the instructor told all students in the class that they would be required to be tested for rubella by means of a blood test. The student signed a consent form for the blood test after being reassured by the instructor that the sample would be tested only for rubella. However, the instructor requested that the laboratory also test the plaintiff for HIV, although the instructor did not request such a test for any other student.

The Colorado Court of Appeals in *Doe* held that the plaintiff was entitled to recover on two theories: one resulting from the unreasonable dissemination of private information, and the other from improper intrusion upon seclusion of another.

To recover for invasion of privacy based on a theory of unreasonable intrusion upon seclusion of another, an individual must show that (1) another person has intentionally intruded, physically or otherwise; (2) upon the individual's seclusion or solitude; and (3) such intrusion would be offensive or objectionable to a reasonable person.

Although the *Doe* case did not involve an employment situation, Colorado employers, particularly those who do drug testing, ought to beware. First, the employer should be sure that a drug test is limited to discovering only information that the employer needs to know. Second, the employer should make sure that the test and consent form are specific enough that the employees know for what substances the sample will be tested. Finally, the employer should make sure that the test results are kept confidential and are not shared with those who have no need to know about them.

§ 22.4.3—Intentional Infliction Of Emotional Distress (Outrageous Conduct)

To establish a claim for intentional infliction of emotional distress under Colorado law, an employee must allege conduct that is so "outrageous in character, and so extreme in degree, as to be beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[79] Generally, courts in Colorado have refused to find that ordinary, adverse employment actions constitute outrageous conduct.[80] However, where the court finds the employer engaged in employment actions involving humiliation, excessive ridicule, threats, or other similar types of conduct, a claim for outrageous conduct may lie, even if the underlying employment action was legal.[81]

§ 22.4.4—Misrepresentation

Colorado courts do not recognize an independent tort action for negligent or intentional misrepresentation based on alleged employment contract obligations.[82] Nonetheless, statements made by an employer, particularly in the pre-hire situation where an employee is induced to accept a new job, may provide the basis for tort, contract, or statutory types of claims.[83]

§ 22.4.5—Colorado Whistleblower Act

C.R.S. § 24-50.5-103 prohibits retaliation against a state employee for reporting a state employer's illegal conduct. Relief is limited to reinstatement and back pay. Colorado also extends the same protection to employees of private enterprises under contract with the state.[84]

§ 22.5 • LEAVES OF ABSENCE

Various federal and Colorado laws provide for mandatory leaves of absence from work. The following is a summary of those laws.

§ 22.5.1—Family And Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA)[85] allows eligible employees of covered employers to use up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- Birth or adoption of a child;
- Adoption or placement of a foster child;
- Care of a spouse, child, or parent with a serious health condition; or
- Recovery from or treatment of the employee's own serious health condition.[86]

During the pendency of the leave, the employer must continue to pay the employer's share of medical benefit plan costs, but not wages.[87] The FMLA entitles the employee only to unpaid leave.

Upon the conclusion of the employee's FMLA leave, the employee must be reinstated to the same or equivalent position as the employee held before the leave, with equivalent benefits, pay, and other terms and conditions of employment.[88]

The FLMA applies only to employers engaged in commerce who employ 50 or more employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year.[89]

To qualify for FMLA leave, the employee must work for a covered employer for a total of 12 months, have worked at least 1,250 hours over the 12-month period immediately preceding the leave, and worked within 75 miles of a location where at least 50 employees are employed by the employer.[90]

The FMLA permits the 12 weeks of leave to be taken all at once — if the qualifying purpose for the leave continues throughout the 12 weeks — or, subject to certain restrictions, intermittently in separate blocks of time.[91] Depending on the circumstances of the leave, FMLA leave may also be taken on a reduced schedule basis, such as reducing an employee's schedule from full-time status to part-time status.[92]

Under the FMLA, there is no obligation to reinstate the employee at the end of his or her FMLA leave if (1) the employee is unable to perform the essential functions of his or her job because of a serious health condition; (2) the employee is laid off or terminated while on leave, provided the employer can show the employee would have been laid off or terminated even if the employee had not been out on leave; (3) the employee's job or shift has been eliminated; (4) the employee was hired to work on a short-term project, which was completed at the time of the employee's return; or (5) the employee is unable to return after his or her FMLA leave has been exhausted.[93] Employees designated "key employees" — *i.e.*, salaried employees who are among the highest-paid 10 percent of all employees employed by the employer within 75 miles of the employer's worksite — may be denied reinstatement if certain notice requirements are met.[94]

Unlike many states, Colorado does not have a state law counterpart to the FMLA; however, Colorado law requires that employers who provide leave to biological parents after the birth of a child must, upon request, provide equivalent leave for adoptive parents, along with any benefits that are provided to biological parents.[95]

§ 22.5.2—Americans With Disabilities Act

In addition to prohibiting discrimination against individuals with disabilities, the Americans with Disabilities Act of 1990 (ADA)[96] requires employers with 15 or more employees on the payroll on each working day of at least 20 weeks in the current or preceding calendar year to reasonably accommodate disabled workers.[97] The Colorado Anti-Discrimination Act (CADA)[98] sets similar accommodation requirements, although it covers employers with two or more employees.

While neither the ADA nor the CADA specifically requires covered employers to provide leave to disabled employees, both statutes' reasonable accommodation requirements may mean that employers must provide leave to accommodate their employees with disabilities when such leave is required and would not cause the employers undue hardship.

§ 22.5.3—Uniformed Services Employment And Reemployment Rights Act

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA)[99] provides for mandatory leave and job restoration to those citizen-soldiers serving in the military, National Guard, or Reserves.

Leave Requirements

The USERRA generally requires the employer to grant up to five years of unpaid leave to employees who belong to or join the military, National Guard, or Reserves. To qualify for protection under the USERRA, an employee must give a certain amount of advance notice that he or she will be leaving for military service. But note that as a practical matter, the exceptions to this notice requirement are so broad that the employer will rarely be able to claim that an employee forfeited his or her USERRA rights by failing to provide adequate notice.

In some ways, the USERRA is similar to the more familiar Family and Medical Leave Act (FMLA). The USERRA, however, provides far broader protections than the FMLA. In addition to providing five years of unpaid leave (compared to only 12 weeks of annual leave under the FMLA), all employers must comply with the USERRA, regardless of how many employees they have (compared to the FMLA, which applies only to employers that have at least 50 employees). The employer may be required to provide even more than five years of leave in certain circumstances.

Employees who have served less than 91 days must be reemployed after their military discharge to the position that they would have attained if they had been continuously employed, if they are qualified or can become qualified for the job. If the individual is not qualified for that position, the individual must be reemployed in the position he or she left prior to military service or in a position that is the nearest approximation of that position. An employer may not offer "other jobs" of equivalent status.

Employees who served 91 or more days must be reemployed after military discharge in a position that they would have attained if continuously employed if they are qualified or can become qualified for the job. If the employee is not qualified, the employer must reemploy the employee in his or her former position, or in a position of equivalent seniority, status, and pay. If those options fail, the employee must be reemployed in a position of "like status" for which the employee is qualified.

Finally, employees who return from military leave cannot be fired for a specified period of time after the leave ends. The duration of this prohibition depends on the length of the employee's leave (generally whether it is more or less than 180 days).

Requirements Relating to Employee Benefits

The USERRA prohibits the employer from requiring employees who take military leave to forfeit any benefits they have already accrued under their retirement plan or to requalify for participation in the plan upon returning from leave. Employees must continue to vest and accrue benefits under the retirement plan as if they were still working for that employer. For example, the employer must make the same contributions to the employee's retirement plan that would have been made if the employee had not been absent on military leave.

In addition, the USERRA also requires that employers provide health continuation coverage to employees who take military leave. This requirement is very similar to the requirements imposed by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Employees who take more than 30 days of military leave must be allowed to continue coverage on the employer's health plan — at the employee's expense — for up to 18 months. But unlike COBRA, the USERRA does not exempt small employers from this requirement. When employees return from military service, they are entitled to health insurance benefits as if they had not taken any leave at all. This means that the employer cannot, for example, impose a waiting period or pre-existing condition exclusion before those employees or their dependents are fully covered under the group health plan (other than waiting periods or exclusions that would have applied anyway). But the employer is allowed to impose such conditions to coverage when an employee's illness or injury is incurred during or aggravated by his or her military service.

§ 22.5.4—Pregnancy Discrimination Act

The Pregnancy Discrimination Act of 1978 (PDA)[100] prohibits job-related discrimination against women due to pregnancy or childbirth. As part of Title VII, the PDA applies only to employers engaged in interstate commerce with 15 or more employees, employment agencies, and labor unions with 15 or more members.

The PDA does not specifically require covered employers to grant pregnancy-related leave. However, if an employer provides leave to employees with non-pregnancy-related disabilities or illnesses, the employer must grant similar leave for pregnancy-related disabilities or illnesses.

§ 22.5.5—Voting Leave

Employers in Colorado are required to give employees who do not have three or more hours outside of work to vote up to two hours during the period polls are open to vote.[101] Such time absent from work shall not result in a loss of pay.

§ 22.5.6—Jury Duty Leave

Under the Colorado Uniform Jury Selection and Service Act,[102] employees are protected from discharge or other adverse employment actions for taking time off from work for jury duty. Moreover, all employed jurors must be paid their regular wages for the first three days of juror service, not to exceed $50 a day unless otherwise agreed to.

§ 22.5.7—Leave For Victims Of Domestic Violence

Employers in Colorado with 50 or more employees are required by statute to give up to three days' unpaid leave to employees who are victims of domestic violence or violent crimes or whose children are victims of domestic violence or violent crimes.[103] The leave granted by this statute is only to be used for purposes of the employee's obtaining a restraining order; obtaining medical care; securing his or her home or seeking new housing to prevent further domestic abuse, stalking, or sexual assault; or obtaining legal assistance or attending legal proceedings.

§ 22.6 • FEDERAL AND STATE WAGE LAWS

§ 22.6.1—The Fair Labor Standards Act

Under the Fair Labor Standards Act (FLSA),[104] covered employers are required to pay non-exempt employees the federal minimum wage. Effective July 24, 2007, the federal minimum wage rate is $5.85 per hour. The minimum wage will increase to $6.55 per hour on July 24, 2008, and to $7.25 per hour on July 24, 2009.

In addition to setting the minimum wage, the FLSA requires covered employers to pay employees working over 40 hours per week overtime pay of at least time and a half; that is, at least one and one-half times the employee's regular hourly wage rate. However, employees who fall within one or more of the exemptions recognized by the FLSA regulations are exempt from the overtime requirements of the FLSA.

The exemptions to overtime most applicable to the construction industry are the "executive" exemption, the "administration" exemption, and the "professional" exemption. To satisfy the requirements of any of these three exemptions, the employee must first be paid on a salary basis of at least $455 per week. Compensation on a "salary basis" means the employee receives a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed.[105]

To meet the requirements of the executive, administration, or professional exemption, the employee must also satisfy the duties test for the applicable exemption. The duties test for the executive, administrative, and professional exemptions are set forth below.

The Executive Exemption

To be exempt from overtime pay, an executive employee must not only be paid a minimum salary of $455 a week, but the employee must perform all of the following exempt duties:

1) The employee must have the primary duty of management of the enterprise or a customarily recognized department or subdivision thereof;
2) The employee must customarily and regularly direct the work of at least two other employees; and

3) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations about hiring, firing, advancement, promotion, or other change of status of other employees must be given particular weight.[106]

The FLSA regulations describe management duties as including interviewing and selecting applicants, training employees, directing employees' work, setting pay rates, and disciplining employees.[107] Executives or managers whose duties include both supervisory and non-supervisory functions may nevertheless be exempt as long as management is their primary duty.[108]

The Administrative Exemption

In addition to making $455 per week, administrative employees must meet the following duties requirements in order to be exempt:

1) Their primary duty must be performing office or non-manual work directly related to the management or general business operations of the employer or employer's customers; and
2) Their primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.[109]

Types of jobs the Department of Labor presumes to be administrative exempt include tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, advertising, marketing, research, human resources, health and safety, employee benefits, legal and regulatory compliance, computer network administration, and Internet and database administration.[110]

The Professional Exemption

To be exempt as a learned professional, the employee not only must be paid on a salary basis of $455 per week, the employee must also:

1) Have the primary duty of performing work that requires advance knowledge in a field of science or learning customarily acquired by a prolonged course of specialized instruction.[111]

"Performing work that requires advance knowledge" means work that is predominately intellectual and includes consistent exercise of discretion and independent judgment.[112] "Advance knowledge in a field of science or learning" means the employee works in an occupation that has recognized professional status. Jobs in the mechanical arts or skilled trades — such as carpentry or plumbing — while requiring knowledge of an advanced type, do not meet this test.[113] Finally, the requirement that the employee has "knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized instruction" means the employee obtained his knowledge by obtaining an advanced academic degree or, in limited circumstances, through a combination of work and intellectual instruction.[114]

Child Labor

The Fair Labor Standards Act also sets minimum age standards for allowing children to work. Under the law, most cannot work before age 16, with 18 being the minimum age for hazardous jobs. Children between the ages of 14 and 16 may work at certain types of jobs that do not interfere with their health, education, or well-being.[115]

§ 22.6.2—Colorado Wage Claim Act

The Colorado Wage Claim Act governs when and how wages are to be paid.[116] Generally, wages must be paid on regularly scheduled paydays.[117] In addition, when an employee is terminated, he or she should receive payment for all wages earned as of that date on the date of termination; if the employer's accounting unit is not operational at that time, wages are due not more than six hours after the start of the next workday.[118] If the employee resigns, wages are due on the next payday.[119] Failure to pay wages at termination may result in not only liability for the wages due, but also penalties, and, in certain cases, attorney fees.[120]

The Colorado Wage Claim Act defines an "employer" as "every person, firm, partnership, association, corporation, migratory field labor or crew leader, receiver, or other officer of court in Colorado, and any agent or officer thereof . . . employing any person in Colorado."[121] In 2003, the Colorado Supreme Court, in response to a question certified by the Tenth Circuit, held that notwithstanding the statutory definition of "employer" in the Act, corporate officers and agents are not personally liable under the Colorado Wage Claim Act.[122] The Colorado Supreme Court concluded that the Colorado Wage Claim Act was intended to work in harmony with established corporate law principles, and refused to depart from those principles to impose personal liability on corporate officers and agents for what amounts to a corporate debt.[123]

§ 22.6.3—Colorado Wage Order 23

In November 2006, Colorado voters passed Amendment 42, which set the minimum wage for all Colorado employees at $6.85 per hour, to be adjusted annually for inflation.[124] In response, the Colorado Department of Labor issued Wage Order 23, which sets the minimum wage for all Colorado employees — not just those covered by Wage Order 23 — at $6.85 per hour.

In addition to setting the minimum wage, Wage Order 23 governs overtime payments for workers in retail and service, commercial support services, food and beverage, and health and medical industries.[125] Wage Order 23 also provides for designated breaks and duty-free meal periods for employees in covered industries.[126]

However, other than being required to comply with Amendment 42's minimum wage rate, the construction industry is specifically exempted from coverage under Wage Order 23.[127]

§ 22.7 • OCCUPATIONAL SAFETY AND HEALTH ACT

In 1970, President Nixon signed the Occupational Safety and Health Act (OSHA) into law, attempting to assure safe and healthful working conditions for all employees.[128] Section 5(a) of the Act basically imposes two requirements on employers. First, an employer must comply with all of the safety and health standards dictated by the Department of Labor, generally called "compliance" requirements.[129] Second, the employer must furnish its employees with a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[130] This second, broad requirement is called the "general duty" clause.

Specific compliance standards apply to the construction industry.[131] For example, the Secretary of Labor promulgates safety and health standards on issues about occupational health and environmental controls.[132] In addition, the Secretary of Labor regulates personal protective and life-saving equipment; fire protection and prevention; signs, signals, and barricades; handling materials; storage use and disposal; tools; electrical equipment; scaffolding; excavations; and toxic and hazardous substances.[133] Specifically, construction employers must guard equipment, conduct excavations, train employees, provide personal protective equipment, and take other steps to provide a safe working environment for their employees.[134] Employees must be trained and informed (through classes, labels, signs) regarding protective measures on everything from wearing protective devices to the proper use of chemicals.[135] In addition, medical examinations must be provided by an employer when an employee has been exposed to toxic substances.[136] One of the most burdensome requirements for employers is the continual-training requirement concerning the communication of workplace hazards. Generally, every time an employee is hired or transferred into a new position, the employer must provide safety training to that employee.[137] A violation of this requirement is one of the most frequently cited types of violations.

Another area of regulation that affects a number of construction employers is a group of requirements that deal with driver training, vehicle inspection, and seat belt usage. For example, material handling (earth-moving) equipment and other motor vehicles must be outfitted with seat belts.[138] In addition, vehicles must be inspected at the beginning of each shift to ensure parts, equipment, and accessories are in safe operating condition.[139]

Penalties and abatement orders may be assessed by the Department of Labor after an inspection of the workspace by an OSHA compliance officer. A non-serious or a serious violation may require payment of a penalty ranging from zero dollars to $7,000.[140] Repeated or willful violations may require payment of up to $70,000.[141] Criminal sanctions, including imprisonment and high fines, are possible where the employer acts willfully and causes the death of an employee.[142]

§ 22.8 • NATIONAL LABOR RELATIONS ACT

Although Colorado employers have not experienced as much union activity as many employers located on the East Coast, it is important to understand that under the National Labor Relations Act, employees have a right to engage in organizing activities, without improper interference. In addition, although unionizing activity is not as common in Colorado as in other states, it is important to understand that employers can easily make mistakes in handling such situations, unless they immediately contact counsel for guidance.

Special rules apply to the construction industry. The National Labor Relations Act (NLRA) governs labor relations issues only if all jurisdictional requirements are satisfied. In essence, the controversy must be considered a "labor dispute" affecting commerce that involves employers and employees. Examples of situations in which labor disputes in the construction industry affected commerce include:

- a construction project where a substantial amount of the materials were procured out of state;[143] and
- a subcontractor involved in a labor dispute who was engaged solely in local construction, but was hired by a general contractor that engaged in interstate commerce.[144]

"Supervisors" are not considered "employees" under the NLRA and thus lack the protections afforded to employees.[145] In the construction industry, foremen or leadmen are considered supervisors if they have effective authority to make employment hiring and firing decisions and have the authority to reward, direct, and discipline employees. In general, the extent of authority governs the supervisory status rather than the job title of "foreman" or "leadman."

Although the NLRA may have jurisdiction to govern a particular dispute, the National Labor Relations Board (NLRB) has discretion to decide not to hear a particular case. The NLRB generally relies on a minimum-dollar standard designed to measure the dispute's impact on commerce. There are special rules for calculating this minimum-dollar standard for employers in multi-employer bargaining units and those involved in secondary boycott cases, which may impact certain construction industry employers.

The NLRB also establishes the criteria for creating appropriate bargaining units to carry out collective bargaining under the NLRA. The construction industry, however, is exempt from coverage of a recent NLRB proposal that favors single-location bargaining units.

Hot cargo agreements, which include agreements between a union and employer to cease conducting business with another employer, are prohibited.[146] The prohibition on these agreements, however, *does not* apply to labor agreements in the construction industry that relate to work to be done at the construction site.[147] Thus, a bargaining agreement between a union and a contractor can contain a clause requiring the subcontractor to enter into a similar agreement with the union.[148] This exemption is limited to employers engaged in on-site construction work.

The construction industry is similarly exempt from some picketing prohibitions. For example, a construction industry union may picket to obtain a prehire agreement, provided the picketing extends for a reasonable period of time, not to exceed 30 days.

Special rules regarding the NLRA's treatment of work assignment disputes apply to the construction industry. Generally, the NLRA prohibits certain activities by employee groups in support of their work assignment dispute. The elimination of a job by an employer generally ends any dispute about that work. However, an exception exists for the construction industry because work assignments typically terminate when one portion of a project has been completed. The NLRA also prohibits coercive strikes and inducing work stoppages of primary or secondary employees. In the construction industry, work stoppages and picketing practices were found to be coercive when they were directed against a contractor in attempts to force it to refuse to work with subcontractors who did not exclusively employ union members.[149]

Overruling its 2000 decision in *Epilepsy Foundation of Northeast Ohio*,[150] the NLRB ruled in 2004 that employees who work in a non-unionized workplace are not entitled to have a co-worker present in investigatory meetings that they reasonably believe may result in discipline.[151] With this decision, only union employees are entitled to have a representative accompany them to a disciplinary interview, or what is common known as "*Weingarten* rights."[152]

§ 22.9 • COLORADO WORKERS' COMPENSATION ACT

Under the Colorado Workers' Compensation Act, all private and public employers must provide workers' compensation coverage for their employees.[153] The Workers' Compensation Act provides the exclusive remedy for employees' job-related injuries, without regard to fault. An "employee" covered by the Act includes "every person in the service of another pursuant to a contract of hire either express or implied."[154] The Act contains certain specific statutory exemptions from the definition of employee.[155]

A worker who meets the criteria established for an independent contractor will not be included within the coverage of the Workers' Compensation Act.[156] The Act provides:

> any individual who performs services for pay . . . shall be deemed to be an employee . . . unless such individual is free from control and direction in the performance of the service, both under the contract . . and in fact, and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.[157]

The power to terminate a worker without incurring any liability will be an important factor in determining whether a worker is "free from control."[158] In addition, another factor courts will examine is the relative nature of the work in relation to the regular business of the employ-

er.[159] Finally, while a written contract may provide evidence that a certain relationship is an independent contractor relationship,[160] the ultimate decision will depend on the actual facts of the relationship.

Liability for workers' compensation benefits can arise under "statutory employer" liability where a business's work is contracted out.[161] Under statutory employer liability, any business entity that contracts out any part of work to a subcontractor will be required to pay workers' compensation benefits for injuries to employees of their uninsured subcontractors. In turn, the statutory employer has immunity from tort liability for an employee's job-related injuries.

The court in *Finlay v. Storage Technology Corporation*[162] provides guidance for determining when a business is a statutory employer. In *Finlay*, the court addressed whether a worker employed by a janitorial service company was a statutory employee of Storage Technology by virtue of the janitorial services the worker provided to Storage Technology. The court concluded that the test for whether an alleged employer is a statutory employer is "whether the work contracted out is part of the employer's 'regular business' as defined by its total business operation."[163] In particular, the courts will examine elements of "routineness, regularity, and the importance of the contracted service to the regular business of the employer."[164] In *Finlay*, the janitorial services were considered an integral, routine, and regular part of Storage Technology's total business operation. The court noted that in the absence of the contracted janitorial services, it would have been necessary for Storage Technology to obtain those services by other means, including employment of janitorial workers.[165]

§ 22.10 • LABOR PEACE ACT

To the extent it deals with issues not preempted by federal labor laws, the Labor Peace Act[166] sets forth the basic rules governing private sector labor relations in Colorado. The Act was enacted to establish "standards of fair conduct in employee relations." The Act gives employees the right to engage in collective bargaining and defines what are unfair labor practices.

In part, the Act prohibited all labor picketing in residential areas, whether peaceful or not. The Colorado Supreme Court fairly recently decided that this provision violates the First Amendment and Equal Protection Clause of the Fourteenth Amendment.[167] In October 1997, the United Steelworkers of America Locals 2102 and 3287 (Union) initiated a strike against the CF&I Steel plant in Pueblo. During the strike, it was alleged that several union members engaged in intimidating conduct toward employees who crossed the picket line. Such alleged conduct included making intimidating telephone calls, committing property damage, following vehicles, making verbal threats, and interfering with the employees' ability to enter and leave the plant, as well as picketing the residences of non-striking employees. CF&I sought a temporary restraining order prohibiting the alleged inappropriate conduct and picketing of employee residences. The court granted the order; however, the Union appealed it. The appeals court upheld the court order to the extent that it prevented harassing or otherwise inappropriate behavior by union members. But the

court reversed the decision with respect to the residential picketing. The Colorado Supreme Court agreed and found the residential picketing provision to be an unconstitutional content-based speech restriction that was not narrowly tailored to advance the state's interest in protecting residential privacy.

§ 22.11 • THE CHANGING WORLD OF IMMIGRATION

The events of September 11, 2001, led to sweeping changes in U.S. immigration law and procedure. For those who deal with employees from outside of the United States, they work in a far more complex environment than they did prior to the terrorist attacks. This Chapter explains a few of the changes and provides practical tips on how to deal with immigration issues in the post-9/11 era.

§ 22.11.1—Overview Of Developments In Immigration Law

New Names and Faces in Immigration

The events of 9/11 focused the country's attention on the shortcomings of the Immigration and Naturalization Service (INS). The INS failed to track some of the terrorists who entered the United States on student visas. Six months later, to add to the controversy, the INS mailed approval notices for two of the deceased terrorists that would have allowed them to extend their visa statuses and continue their flight training. These failures, along with a multitude of other problems, led to a nearly universal call for the abolition of the INS.

In response, President Bush signed into law The Homeland Security Act of 2002 (PL 107-296), which led to the creation of the new Department of Homeland Security (DHS). The INS was thus disbanded and its functions were merged into three new divisions within DHS, consisting of the Bureau of Immigration and Customs Enforcement (BICE), the Bureau of Customs and Border Protection (BCBP), and the Bureau of Citizenship and Immigration Services (BCIS). Shortly thereafter, on September 8, 2003, DHS dropped the term "Bureau" from the titles of these three divisions in hopes, perhaps, that the divisions' new names would make them seem less bureaucratic. The initials of these divisions are now, respectively, USICE, USCBP, and USCIS.

With the establishment of DHS, important changes occurred in the former INS's leadership. Some of the new leadership challenged former immigration policy memoranda (which often served as practical substitutions for regulations) and began to implement new policies and procedures (often without notifying the public of the changes). Such changes, coupled with the problem of many newly hired and untrained immigration officers, have dramatically increased the uncertainty of employers who are seeking to retain or hire foreign employees.

Scrutiny in Applications for Benefits

In April 2002, just after four Pakistani crewmen had unlawfully obtained visa waivers from a border officer and disappeared into Virginia, the Commissioner of the former INS testified before Congress that he had instituted a "zero-tolerance policy with regard to INS employees who

failed to abide by headquarters-issued policy and field guidance."[168] This directive understandably made a lot of immigration officers nervous. As a consequence, many began to send Requests for Evidence (RFEs), seeking to verify, and often re-verify, employers' assertions in pending visa petitions and to ensure that cases were properly adjudicated. Unfortunately, such requests have led to longer processing times and backlogs at the service centers. Indeed, even when an employer pays for premium processing (an approach by which an employer may pay an additional $1,000 to have a case adjudicated within 15 calendar days), it may find that the USCIS will issue RFEs that can still lead to substantial processing delays.

Immigration officers seem to be particularly concerned about the qualifications of skilled employees and their positions. For such workers, including essential skills workers (for E-2 visas), specialized knowledge workers (for L-1B visas), and specialty occupation workers (for H-1B visas), the USCIS has become skeptical about certain types of positions and employees. Occasionally, especially in the context of E-2 and L-1B workers, immigration officers have required evidence that American employees could not be trained to perform the proposed beneficiary's duties. Furthermore, except in clear-cut cases, the USCIS appears to be more willing to challenge the specialized nature of proposed positions in H-1B petitions and the employees' credentials to fill such positions (either because of their educational backgrounds or because of their previous failures to comply with applicable immigration laws).

Visa Options for Employers

The world of employment-based immigration involves two types of visas — immigrant and nonimmigrant visas. The immigrant visas (or "green card") allow foreign-born nationals to work anywhere in the United States on a permanent basis, and those types of visas are beyond the scope of this Chapter. The nonimmigrant visas, on the other hand, are employer-specific and temporary in nature.[169] Because the immigrant visa process can take a number of years, most employers commence the immigration process with petitions for nonimmigrant visas for their employees.

Employers have a number of nonimmigrant visa options to consider. Some of the more common employment-based visa options include the following:

E-1 Treaty Trader/ E-2 Treaty Investor Visa

The E visas are available to a foreign national coming to the United States, under the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he or she is a national, to carry on substantial trade in goods or services or to direct the operations of an enterprise in which he or she (or the foreign employer) has invested or is in the process of investing a substantial amount of capital.[170]

H-1B Specialty Occupation Visa

The H-1B visa allows a foreign worker to be employed in the United States for a period of up to six years. The employee must have a Bachelor's degree or equivalent (*i.e.*, substantial experience at a professional level), and the job offered must require the services of an individual with a degree.[171]

There is a 65,000-per-year limit on the number of foreign workers who may receive initial H-1B visa status during each USCIS fiscal year (with an additional 20,000 allocation of H-1B visas for foreign nationals who earned a Master's or higher degree from a U.S. institution). The fiscal year runs from October through September.

L-1 Visa for Intracompany Transferees

This visa is available to a foreign national who has been employed for at least one continuous year out of the last three by an international firm or corporation. It enables people to enter the United States temporarily to continue to work for the same employer, or a subsidiary or affiliate, in a capacity that is primarily managerial, executive, or involves specialized knowledge.[172]

TN Visa

This visa is available to qualified Mexican or Canadian professionals seeking to enter the United States to engage in one of the professions listed under NAFTA. The listed professions are generally professional (*e.g.*, engineer, accountant, etc.), and they usually require a degree in the specific field of endeavor.[173]

H-2B Visa

The H-2B nonimmigrant visa program permits employers to hire foreign workers to come to the United States and perform temporary nonagricultural work, which may be one-time, seasonal, peak load, or intermittent.[174]

There is a 66,000-per-year limit on the number of foreign workers who may receive H-2B status during each USCIS fiscal year (October through September).

While employers have a number of additional visa options (*e.g.*, J-1 training visas, H-3 training visas, etc.), the foregoing list provides a summary of the most popular nonimmigrant options for employers in the construction industry. Before proceeding with a nonimmigrant petition, employers should discuss visa options for prospective employees with competent legal counsel to ensure that they are in compliance with established substantive and procedural requirements.

§ 22.11.2—Enforcement Activities And Mismatch Letters

Increased Enforcement Activity in the Wake of 9/11

Enforcement activities have clearly become more dramatic in the wake of 9/11. The IFCO Pallet Company and Swift & Company raids are illustrative. In the case of IFCO Pallet Company, besides the hundreds of allegedly illegal employees who were taken into custody, several managers were charged with criminal violations and arrested.

In light of these raids and a multitude of similar raids in recent months throughout the country, employers must establish appropriate I-9 compliance programs to avoid liability.[175] While the Clinton Administration tended to focus on civil penalties, the Bush Administration has been much more interested in imposing criminal penalties against unscrupulous employers. Employers, therefore, should ensure that their I-9 forms are completed in a thorough and timely

manner, that they are on file for the appropriate timeframes, and that they are not knowingly employing illegal aliens. Failure to comply with these federal requirements, in some instances, could lead to criminal prosecution under the broad harboring statute.[176]

Social Security Mismatch Letters

The Social Security Administration (SSA) has contributed a great deal to the anxiety of employers and foreign nationals with its mismatch letters in the wake of 9/11. The SSA annually reviews W-2 forms and credits Social Security earnings to workers. If a name and a Social Security Number (SSN) on a W-2 do not match SSA records, the SSA often sends a letter to advise the employer of the problem.

An employer's failure to follow appropriate procedures with these letters could lead to liability under the Immigration Reform and Control Act.[177] In the immigration context, employers will need to walk a fine line between demanding documentation that could lead to possible discrimination claims[178] and ignoring possible warning signs (such as previous notices from SSA about certain employees, statements made by foreign employees, etc.) that could lead to a finding of continuing to employ an illegal alien with knowledge or, equally bad, "constructive knowledge."[179]

To alleviate some of the confusion relating to mismatch letters, U.S. Immigration and Customs Enforcement (ICE) finally published a regulation to address this issue. On August 15, 2007, ICE published a regulation regarding how employer(s) should respond to mismatch letters from the SSA.[180] The new regulation specifies "safe harbor" procedures for employers that receive such letters. By taking these steps in a timely fashion, an employer could avoid a finding that the employer had constructive knowledge that the affected employee was not authorized to work in the United States. The safe-harbor procedures include attempting to resolve the mismatch and, if it cannot be resolved within a certain period of time, verifying again the employee's identity and employment authorization through a specified process.

As mentioned, it is unlawful for an employer, after hiring a foreign national for employment, to continue to employ that person with knowledge that he or she is (or has become) an unauthorized alien.[181] An employer that hires or continues to employ a person with knowledge that the person is not authorized to work in the United States is liable for civil and, in some instances, criminal penalties. As mentioned, the term "knowing" includes not only actual knowledge but also constructive knowledge — *i.e.*, knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.[182]

The new rule adds two additional examples of scenarios that could lead to a finding that an employer had constructive knowledge. These scenarios involve an employer's failure to take reasonable steps in response to either of two events:

> The employer receives written notice from the SSA that the combination of name and Social Security account number submitted to SSA for an employee does not match agency records; or

> The employer receives written notice from the DHS that the immigration status or employment-authorization documentation presented or referenced by the employee in completing Form I-9 was not assigned to the employee according to DHS records.

After receiving a mismatch letter, the employer should check its records initially to determine whether the discrepancy results from a clerical error in the employer's records or in its communication to the SSA or DHS. If there is such an error, the employer should correct its records, inform the relevant agencies, and verify that the name and number, as corrected, match agency records. In the new regulation, ICE instructs the employer to take such steps within 30 days of receipt of the mismatch letter.

If such actions do not resolve the discrepancy, the employer should request (preferably in writing and still within the initial 30-day timeframe) the employee to confirm that the employer's records are correct. If they are not correct, the employer should take necessary actions needed to correct them, inform the relevant agencies, and verify the corrected records with the relevant agency. If the records are correct according to the employee, the employer should ask the employee to pursue the matter personally with the relevant agency, *e.g.*, visit a local SSA office, bringing original documents or certified copies required by SSA, which might include documents that prove age, identity, citizenship or alien status, and other relevant documents, such as proof of a name change, or by mailing these documents or certified copies to the SSA office, if permitted by SSA.

A discrepancy will be considered resolved only if the employer verifies with SSA or DHS, depending upon the agency involved, that the employee's name, number, etc., matches SSA's or DHS's records.

If the discrepancy is not resolved within 90 days of receipt of the mismatch letter, the employer should perform a re-verification procedure (again, using the I-9 form). Using the same procedures as if the employee were newly hired, the employer would complete a new I-9 form, completing both Sections 1 and 2 within 93 days (or within three days of the 90-day period expiring) of receipt of the mismatch letter. The only differences are that the employer would not be allowed to accept documentation containing the defective Social Security Number or alien number that is the subject of the mismatch letter. In addition, the employer could not accept a document without a photograph to establish identity (or both identity and employment authorization).

The regulation only specifies "safe-harbor" procedures employers could follow to avoid a finding of "constructive knowledge." The regulation would not prohibit DHS from finding that an employer had actual knowledge that an employee was an unauthorized alien. In other words, an employer with actual knowledge that one of its employees is unauthorized to work, or an employer with a variety of other warning signs about unlawful activity that would tend to put the employer on notice of a problem, could not avoid liability by following the procedures described in the new regulation.

Finally, as of the date of this publication, it should be noted that the future of this mismatch regulation is uncertain. On October 10, 2007, the U.S. District Court for the Northern District of California issued a preliminary injunction in *AFL-CIO v. Chertoff*.[183] The practical effect of the preliminary injunction is that DHS and SSA have been prevented from sending the 2007 SSA mismatch letters they had prepared for more than 140,000 employers, and that these two agencies cannot take further steps to implement the mismatch rule until the court issues a final decision on the merits. Even if the government loses the case on the merits, it will undoubtedly seek to republish its final rule following the instructions it will receive from the court. Consequently, as SSN mismatch-related concerns arise in the future, employers will want to ensure that they track the outcome of this litigation and discuss these issues with competent legal counsel.

New Complications with Contract Labor — Wal-Mart Raids

The Wal-Mart raids raise questions about an employer's obligations with respect to independent contractors. The general rule is that an employer is not required to complete a Form I-9, Employment Eligibility Verification, for an independent contractor.[184] There are, however, a couple of exceptions to this rule.

First, a company may not employ (directly or indirectly) somebody whom its management knows to be unauthorized to work in the United States.[185] This "knowing" requirement for a violation of the statute also includes "constructive knowledge" (described in greater detail above). As discussed above, the DHS adopts a broad view of constructive knowledge, asserting that the term includes "not only actual knowledge, but also knowledge which may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[186] Under the applicable regulations, knowledge inferred from the facts may arise where the employer (1) fails to complete a Form I-9; (2) has information available to it that indicates the employee is not authorized to work; or (3) acts with reckless disregard by permitting another individual to introduce unauthorized workers to the workforce. In the Wal-Mart case, DHS relied upon this third requirement, alleging that Wal-Mart officials acted with knowledge, or at least reckless disregard, by permitting independent contractors to introduce unauthorized workers in their stores.

A key lesson of the Wal-Mart raids is that an employer may not circumvent its duty to complete a Form I-9 with an unwarranted claim that an employee is an independent contractor. While the law does not require the employer to complete a Form I-9 for a true "independent contractor," the law defines this term narrowly.[187] If the employer does not complete a Form I-9 based upon its good faith belief that a worker is an independent contractor, it will need to ensure that it has adequate evidence to support its claim.

The employer should look to several different factors in making a decision about whether to complete a Form I-9 for an independent contractor. Some of these factors include whether the individual or entity (1) supplies his/her/its own tools or materials to perform the job, (2) makes its services available to the general public, (3) works for a number of clients at the same time, (4) directs the order or sequence in which the work is to be done, and (5) determines the hours during

which the work is to be done.[188] The employer may also want to look at the following additional common law factors to determine whether it has a duty to complete a Form I-9: (1) whether its relationship includes substantial supervision of the contractor; (2) whether its determination of rate of pay is by the hour or by the number and quality of jobs; (3) the intent of its relationship with the contractor and the local and industry practices with service contracts; and (4) whether it offers the contractor certain benefits (*e.g.*, annual leave, retirement, Social Security). The employer should carefully review the foregoing factors before concluding that it does not have an obligation to complete a Form I-9.

The consequences for either turning a blind eye to the illegal status of independent contractors or failing to complete I-9 forms for individuals who may not qualify as independent contractors can be severe. On May 18, 2005, Wal-Mart agreed to pay $11 million to settle allegations it knowingly used illegal immigrants to clean its stores. The settlement clears Wal-Mart of federal charges for hiring illegal immigrants.

Wal-Mart's payment of this fine, however, did not close this chapter completely. Michael J. Garcia, assistant secretary for ICE, said, "This case breaks new ground not only because this is a record dollar amount for a civil immigration settlement, but because this settlement requires Wal-Mart to create an internal program to ensure future compliance with immigration laws by Wal-Mart contractors and by Wal-Mart itself." That internal program, which has been heralded by ICE as the type of program employers should use, has indemnity clauses, verification clauses that all employees are legally working in the United States, I-9 audit reviews, a requirement to participate in the SAVE or Basic Pilot Program, and even a requirement that an independent expert (immigration attorney) review the contractor's I-9 program and confirm that the contractor is in compliance in all respects.

Incidentally, though Wal-Mart's managers avoided criminal charges, its independent contractors were not as lucky. The dozen contractors who actually hired the laborers for work inside Wal-Mart stores agreed to plead guilty to various criminal charges. They also had to pay additional fines (beyond Wal-Mart's $11 million) to the tune of $4 million.

The days of turning a blind eye to independent contract labor are over. At the very least, an employer should implement protective policies with respect to all service contracts and require the inclusion of written assurances and contractor compliance standards in all such contracts.

An employer may also want to play an active role in reviewing the legal status of the employees of independent contractors. For example, the employer could demand that its independent contractors provide copies of the I-9 employment verification forms of their employees. That way, the employer can ensure that the contractors have completed the forms correctly, and that they have completed them for all of their employees.

Finally, an employer may want to go as far as to require its independent contract labor to participate in the new Systematic Alien Verification for Entitlements (SAVE) program (a requirement Wal-Mart has implemented under its new compliance requirements). This program, which is

operated jointly by the DHS and SSA enables employers to verify that all employees are in legal status (though many employers have complained of high error rates in these verification systems). Under this program, an employer is given software that permits it to access the joint database of both DHS and SSA, to verify the employment authorization of all *newly* hired employees. An employer's participation in this program is *voluntary*.

The SAVE program has been expanded to all 50 states. To sign up, an employer may visit the program's website.[189] The program is free to participating employers.

New Colorado Laws

During the 2006 regular and special sessions, the Colorado legislature passed a multitude of new laws relating to immigration. Several of those laws impact Colorado employers, imposing new obligations or sanctions beyond the provisions of the federal Immigration Reform and Control Act of 1986 (IRCA). As outlined above, IRCA requires employers to review certain documents and complete an I-9 form for each new hire, verifying that the individual is authorized to work in the United States. The new Colorado legislation, however, goes farther than the federal laws.

A new Colorado law[190] concerning employment verification requirements became effective on January 1, 2007. This law applies to public and private employers who transact business in Colorado, and to employees hired on or after January 1, 2007. There are two main components to the law:

> 1) Each employer in Colorado shall make an affirmation within 20 days after hiring a new employee. The employer must keep a written or electronic copy of the affirmation for the term of employment of each employee. A copy of the state's sample affirmation document may be located online;[191]
> 2) The employer must keep a written or electronic copy of the employee's identity documents presented for the federal Form I-9. The copies must be retained for the term of employment of each employee. Accordingly, while federal law makes photocopying documents discretionary, state law now makes such photocopies mandatory.

The documents described above should not be submitted to the Colorado Division of Labor, unless specifically requested by the Division. Instead, as is the case under federal law, the employer should complete the necessary paperwork and have it ready for the possibility of either a federal or state audit.

Another important state law, HB 06-1343, became effective August 7, 2006.[192] This statute affects contractors who provide services to state agencies and political subdivisions of the state, broadly defined to include most state and local governments, districts, and other public entities. Public contracts for services appear to include provisions that (1) prohibit the contractor from knowingly employing or contracting with illegal aliens, or using subcontractors who do so; (2) require the contractor to participate in the federal SAVE or "Basic Pilot Program" to verify that it

does not employ illegal aliens; and (3) require the contractor to take specified actions if it learns that a subcontractor is employing illegal aliens. Violation of these provisions will constitute a breach of contract, allowing the public entity to terminate the contract and recover damages. In addition, if an employer is found to be in violation of this law, its name will be included on a list of all terminated contractors maintained by the Secretary of State.

It is unclear whether the new Colorado legislation would survive a constitutional challenge. A variety of legal arguments, particularly the Supremacy Clause of the U.S. Constitution, would appear to make the legislation vulnerable to a conclusion that it is in violation of or in contradiction to federal and constitutional law. Nonetheless, since the courts are not always consistent in their rulings, employers are advised to adhere to the new Colorado legislation.

NOTES

1. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 710 (Colo. 1987); CJI-Civ. 31:5 (CLE ed. 2007).

2. *Continental Air Lines, Inc.,* 731 P.2d at 711.

3. *Id*. at 711-12.

4. C.R.S. § 13-80-101(1)(a).

5. *Giampapa v. American Family Mut. Ins. Co*., 64 P.3d 230, 238 (Colo. 2003); *Decker v. Browning Ferris Indus., Inc.*, 931 P.2d 436, 447-48 (Colo. 1997).

6. *See* C.R.S. § 13-21-102.5(6)(a)(I)(A).

7. *Bd. of County Commn'rs v. DeLozier*, 917 P.2d 714, 716 (Colo. 1996).

8. *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983).

9. *See, e.g.*, *Gladys Antonio v. The Sygma Network, Inc.*, 458 F.3d 1177 (10th Cir. 2006); *Hoyt v. Target Stores*, 981 P.2d 188, 194 (Colo. App. 1998) (*citing Soderlun v. Public Service Co.*, 944 P.2d 616 (Colo. App. 1997)). *But see Giannola v. Aspen Pitkin Hous. Auth.*, 165 Fed. Appx. 661 (10th Cir. 2006) (whether at-will disclaimer in personnel manual barred plaintiff's contract claim was issue for jury).

10. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 108 (Colo. 1992).

11. *Id*. at 109. *See also* CJI-Civ. 31:11 (CLE ed. 2007).

12. *See, e.g.*, *Anderson v. Royal Crest Dairy, Inc.*, 281 F. Supp.2d 1242, 1249 (D. Colo. 2004) (recognizing wrongful discharge against public policy when employee discharged for pursing workers' compensation claim); *Hoyt v. Target Stores*, 981 P.2d 188 (Colo. App. 1988) (wrongful discharge claim against public policy properly stated for employee allegedly fired for complaining of violation of Colorado Wage Claim Act).

13. *See, e.g.*, *Armani v. Maxim Healthcare Services, Inc.*, 53 F. Supp.2d 1120, 1132 (D. Colo. 1999) (hiring a lawyer in connection with an FLSA claim insufficient to support wrongful discharge against public policy claim); *Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999) (refusing to expand wrongful discharge against public policy exception where employee engages in illegal act required by employer and is later fired to cover up employer's complicity in crime); *Jaynes v. Centura Health Corp.*, 148 P.3d 241 (Colo. App. 2006) (national nursing association guidelines do not state public policy to support wrongful discharge against public policy claim); *Slaughter v. John Elway Dodge Southwest/Autonation*, 107 P.3d 1165, 1170 (Colo. App. 2005) (no wrongful discharge against public policy for employee who refuses to take drug test required by a private employer).

14. *See, e.g.*, *Krauss v. Catholic Health Initiatives Mountain Region*, 66 P.3d 195 (Colo. App. 1993) (wrongful discharge against public policy based on the federal Family Medical Leave Act dismissed, where Act provides remedy for employees discharged in retaliation for exercising rights under the Act);

Gamble v. Levitz Furniture Co., 759 P.2d 761 (Colo. App. 1988) (where employee claimed wrongful discharge because of disability in violation of state and anti-discrimination laws, wrongful discharge against public policy will not lie); *Corbin v. Sinclair Mktg., Inc.*, 684 P.2d 265 (Colo. App. 1984) (no wrongful discharge against public policy where Occupational Safety and Health Act provides statutory remedies for safety violations).

15. C.R.S. § 13-80-102.

16. *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 460 (Colo. App. 2003) (damages for wrongful discharge limited to "back pay, loss of future pay, loss of benefits, and related economic losses proximately resulting from the discharge").

17. *See* CJI-Civ. 31:14 (CLE ed. 2007).

18. *Doll v. U.S. West Communications, Inc.*, 85 F. Supp.2d 1038 (D. Colo. 2000).

19. *Id*. at 1046.

20. *See, e.g.*, *Thomas Decker v. Browning-Ferris Industries of Colorado, Inc. (Decker I)*, 931 P.2d 436, 446 (Colo. 1997); *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 536 (10th Cir. 1994). While commentators argue that Colorado recognizes a claim of breach of "an express covenant of good faith and fair dealing" in *Decker I*, the parties in that case submitted to the jury the issue of whether the company had breached an express covenant of good faith and fair dealing. The court was never asked whether such a claim exists in an at-will employment context.

21. *Decker I*, 931 P.2d at 442, n.5 (stating the court chose to "express no opinion with respect to questions relating to the recognition of an implied covenant of good faith and fair dealing in the employment context). *See also Shepherd v. U.S. Olympic Comm.*, 94 F. Supp.2d 1136, 1148-49 (D. Colo. 2000) (refusing to recognize implied covenant of good faith and fair dealing in employment context).

22. *Soderlun v. Public Service Co. of Colorado*, 944 P.2d 616, 623 (Colo. App. 1997).

23. *Id*.

24. *See, e.g.*, *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1199 (Colo. App. 1997) (statement that employee handbook was to "promote fair and equitable standards for all employees" and that supervisor was to maintain "fair and equitable treatment for all employees" too vague to be enforceable); *Schur v. Storage Tech. Corp.*, 878 P.2d 51, 55 (Colo. App. 1994) (promise of fair treatment in handbook did not alter at-will status of employment nor create a contract claim); *Vasey v. Martin-Marietta Corp.*, 29 F.3d 1460, 1466 n.2 (10th Cir. 1994) (court rejected express covenant claim; employer statements of fair treatment were unenforceable, vague assurances).

25. *Decker I*, 931 P.2d at 446.

26. *See McFarland v. Bank One Colo.*, No. 97-S-3239 (D. Colo. Dec. 30, 1997) (discharged bank employee's claims for breach of implied contract, promissory estoppel, and breach of covenant of good faith and fair dealing based on handbook statement that bank would treat employees "in good faith and even handedly" barred by three disclaimers acknowledging employee's at-will status).

27. 42 U.S.C. §§ 2000e through 2000h-4.

28. 42 U.S.C. § 1981.

29. 29 U.S.C. §§ 621 through 634.

30. 42 U.S.C. §§ 12101 through 12213.

31. 29 U.S.C. § 206(d).

32. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-32 (1971).

33. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (Title VII anti-retaliation provision); 29 U.S.C. § 623(d) (ADEA anti-retaliation provision); 42 U.S.C.. § 12203(a) (ADA anti-retaliation provision).

34. *Burlington North and Santa Fe Ry. v. White*, 126 S.Ct. 2405 (2006).

35. *Id*. at 2415.

36. C.R.S. §§ 24-34-401, *et seq.*

37. C.R.S. § 24-34-401(3).

38. C.R.S. § 24-34-402(1)(h)(I).

39. C.R.S. § 24-34-402(1)(h)(II).

40. C.R.S. § 24-34-402.5(1).

41. *See, e.g.*, *Slater v. King Soopers*, 809 F. Supp. 809 (D. Colo. 1992) (lawful, off-duty conduct statute would have protected employee who was fired for membership in the Ku Klux Klan had statute of limitations not run).

42. C.R.S. § 24-34-402.5(2)(a).

43. C.R.S. § 24-34-402.5(2)(b).

44. C.R.S. § 24-34-402(1)(a).

45. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 716 n.2, 721 (1963).

46. *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D. Colo. 1981).

47. 42 U.S.C. § 2000e(j); *Buonanno v. AT&T Broadband*, 313 F. Supp.2d 1069 (D. Colo. 2004) (employee's termination for refusal to sign diversity policy that conflicted with his religious beliefs was discriminatory where employer failed to make an effort to accommodate employee's beliefs).

48. U.S. Equal Employment Opportunity Commission, Compliance Manual ¶ 3706 (1995); *see also* 42 U.S.C. § 12112(b).

49. *See Leonel v. American Airlines*, 400 F.3d 702 (9th Cir. 2006) (employers cannot send applicants on medical examination until after employers have collected all non-medical information and make the applicants a genuine offer, one that does not depend on anything except passing the medical exam); *Buchanan v. City of San Antonio*, 85 F.3d 196 (5th Cir. 1996) (conditional job offer had not yet been extended at time of medical exam when offer was also conditioned on background check and polygraph examination).

50. *Colorado Civil Rights Comm'n v. North Washington Fire Protection Dist.*, 772 P.2d 70, 75-76 (Colo. 1989).

51. *See U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-80 (3rd Cir. 1980).

52. *Id*. at 579.

53. U.S. Equal Employment Opportunity Commission, Compliance Manual ¶ 2088.

54. *Id*.

55. 15 U.S.C. §§ 1681, *et seq.*

56. *See* C.R.S. § 13-54.5-110 (prohibiting employers from discharging an employee because of garnishment).

57. 8 U.S.C. § 1324b(a).

58. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

59. *See An v. Regents of the Univ. of California*, 94 Fed. Appx. 667 (10th Cir. 2004) (employer not liable for alleged harassment where no tangible employment action taken, employer adopted an anti-harassment policy, and employee unreasonably failed to avail herself of harassment reporting procedures).

60. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (city was liable for the sexually harassing conduct of its supervisors where officials had not disseminated its policy on sexual harassment among employees and officials did not keep track of the conduct of their supervisors).

61. *Oncale v. Sundowner Offshore Serv.*, *Inc.*, 523 U.S. 75 (1998).

62. *Id*. at 80 (emphasis added).

63. *Id*.

64. *See, e.g.*, *Chavez v. New Mexico*, 397 F.3d 826, 831-32 (10th Cir. 2005).

65. *See, e.g.*, *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996).

66. *See, e.g.*, *Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003).

67. *See* Equal Employment Opportunity Commission Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99) available at www.eeoc.gov. *See also* C.R.S. § 24-34-402(1)(a) (harassment illegal under the CADA).

68. *Continental Cas. Co. v. Southwestern Bell Tel. Co.*, 860 F.2d 970, 976 (10th Cir. 1988).

69. *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1387 (Colo. App. 1986).

70. *Lindemuth v. Jefferson County Sch. Dist. R-1*, 765 P.2d 1057, 1058 (Colo. App. 1988).

71. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1346 (Colo. 1988).

72. *See Borquez v. Robert C. Ozer, P.C.*, 923 P.2d 166, 175-76 (Colo. App. 1995), *rev'd in part on other grounds*, 940 P.2d 371, 377 (Colo. 1997).

73. C.R.S. § 8-2-114(2).
74. *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 897 (Colo. 2002).
75. *Borquez v. Robert C. Ozer, P.C.*, 940 P.2d 371 (Colo. 1997).
76. *Id*. at 377.
77. *Id*.
78. *Doe v. High-Tech Institute, Inc.*, 972 P.2d 1060 (Colo. App. 1998).
79. *Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 383 (10th Cir. 1988) (internal citations omitted); *Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970) (citations omitted).
80. *See, e.g.*, *Covert v. Allen Group, Inc.*, 597 F. Supp. 1268, 1270 (D. Colo. 1984) (no outrageous conduct for refusing to honor promise to employees); *Salimi v. Farmers Ins. Group*, 684 P.2d 264, 265 (Colo. App. 1994) (demotion in violation of policy and procedural manual not outrageous conduct).
81. *See, e.g.*, *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002) (employer liable for outrageous conduct for terminating an employee who was in bed recuperating from a heart attack); *Ellis v. Buckley*, 790 P.2d 875 (Colo. 1989) (outrageous conduct claim stated where employee interrogated for theft by examiner who kept employee confined for over two hours in small room).
82. *See, e.g.*, *Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002, 1004 (Colo. App. 1991); *Bloomfield Fin. Corp. v. Nat'l Home Life Assurance Co.*, 734 F.2d 1408, 1414-15 (10th Cir. 1984).
83. *See, e.g.*, *Berger v. Security Pac. Info. Sys.*, 795 P.2d 1380, 1384 (Colo. App. 1990) (employer's failure to disclose known risk that job would soon be discontinued supported claim for fraudulent concealment); *Pickell v. Arizona Components Co.*, 902 P.2d 392, 396 (Colo. App. 1994) (reinstating trial court's judgment that employer's representations created a term of employment, giving rise to plaintiff's promissory estoppel claim); C.R.S. § 8-2-104 (making it unlawful to induce "workmen" to change from one place of employment to another by false or deceptive representations).
84. C.R.S. § 24-114-102.
85. 29 U.S.C. §§ 2601 through 2654.
86. 29 U.S.C. § 2612(a)(1)(A) through (D).
87. 29 C.F.R. § 825.209.
88. 29 U.S.C. § 2614.
89. 29 U.S.C. § 2611(4).
90. 29 C.F.R. § 825.110(d).
91. 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.117.
92. *Id*.
93. 29 U.S.C. § 2614; 29 C.F.R. §§ 825.214, 825.215.
94. 29 U.S.C. §§ 2614(b)(1), (2); 29 C.F.R. §§ 825.217, 825.219.
95. C.R.S. § 19-5-211(1.5).
96. 42 U.S.C. §§ 12101 through 12213.
97. 42 U.S.C. § 12112.
98. C.R.S. §§ 24-34-301 through -804.
99. 38 U.S.C. §§ 4301 through 4333.
100. 42 U.S.C. § 2000e(k).
101. C.R.S. § 1-7-102.
102. C.R.S. §§ 13-17-126 through -145.
103. C.R.S. § 24-34-402.7.
104. 29 U.S.C. §§ 201, *et seq.*
105. 29 C.F.R. § 541.602.
106. 29 C.F.R. §§ 541.100 through 541.106.
107. 29 C.F.R. § 541.102.
108. 29 C.F.R. § 541.106.
109. 29 C.F.R. §§ 541.200 through 541.204.
110. 29 C.F.R. § 541.201(b).
111. 29 C.F.R. § 541.300.
112. 29 C.F.R. § 541.301(b).

113. 29 C.F.R. § 541.301(c).
114. 29 C.F.R. § 541.301(d).
115. 29 U.S.C. §§ 203(1), 213(c), 214(b).
116. C.R.S. §§ 8-4-101, *et seq.*
117. C.R.S. § 8-4-103.
118. C.R.S. § 8-4-109(1)(a).
119. C.R.S. § 8-4-109(1)(b).
120. C.R.S. §§ 8-4-109(3) and -110(1).
121. C.R.S. § 8-4-101(5).
122. *Leonard v. McMorris*, 106 F. Supp.2d 1098 (D. Colo. 2000), *question certified*, 272 F.3d 1295 (10th Cir. 2001), *certified question answered*, 63 P.3d 323 (Colo. 2003), *rehr'g denied, answer to certified question conformed to*, 320 F.3d 1116 (10th Cir. 2003).
123. *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003).
124. Colorado Secretary of State Election Center page on Amendment 42, available at www.elections.colorado.gov. *See also* Colorado Department of Labor and Employment, Division of Labor, Minimum Wage Fact Sheet, available at www.coworkforce.com/lab/MinimumWageFactSheet.pdf.
125. C.C.R. § 1103-1.
126. C.C.R. §§ 1103-1(4), 1103(1)(8).
127. Colo. Dept. of Labor & Employment Advisory Bulletin #30(I).
128. 29 U.S.C. § 651(b).
129. 29 U.S.C. § 654(a)(2).
130. 29 U.S.C. § 654(a)(1).
131. *See* 29 C.F.R. § 1926.
132. *Id*.
133. *Id*.
134. 29 C.F.R. §§ 1926.21, 1926.28, 1926.95, 1926.200 and 1926.651.
135. 29 C.F.R. §§ 1926.21 and 1910.134.
136. *See, e.g.*, 29 C.F.R. § 1926.60(n) (providing medical surveillance for employees exposed to MDA).
137. *See, e.g.*, 29 C.F.R. § 1910.100(j)(7) (requiring continual education and training for employees exposed to impermissible amounts of asbestos).
138. 29 C.F.R. §§ 1926.601(b)(10) and 1926.602(a)(2).
139. 29 C.F.R. § 1926.601(b)(14).
140. 29 C.F.R. § 666(c).
141. 29 C.F.R. § 666(a).
142. 29 C.F.R. § 666(e).
143. *See Shirley-Herman Co. v. Int'l Hod Carriers, Bldg. & C.L. Union*, 182 F.2d 806 (2nd Cir. 1950).
144. *See NLRB v. E. F. Shuck Constr. Co.*, 243 F.2d 519 (9th Cir. 1957).
145. 29 U.S.C. § 152(c).
146. 29 U.S.C. § 158(e).
147. *NLRB v. Muskegon Bricklayers Union*, 378 F.2d 859, 862-63 (6th Cir. 1967).
148. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983).
149. *George E. Hoffman & Sons, Inc. v. International Bhd. of Teamsters*, 617 F.2d 1234 (7th Cir. 1980).
150. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).
151. *IBM Corp*., 341 NLRB 148 (2004).
152. *NLRB v. Weingarten*, 420 U.S. 251 (1975).
153. C.R.S. §§ 8-40-101, *et seq.*
154. C.R.S. § 8-40-202(1)(b).
155. *See, e.g.*, C.R.S. § 8-40-301(1) (recreational activity exclusion); C.R.S. § 8-40-301(2) (licensed real estate agents); C.R.S. § 8-41-202 (corporate officer exclusion).

156. C.R.S. § 8-40-202(2).

157. *Id*.

158. *See Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1220 (Colo. App. 1990) ("one of the main issues to be decided is whether the purported employee has the right to terminate the relationship without liability").

159. *Id*. at 1221.

160. *See* C.R.S. § 8-40-202(2)(b) (outlining specific criteria).

161. *See* C.R.S. § 8-41-401.

162. *Finlay v. Storage Tech. Corp.*, 764 P.2d 62 (Colo. 1988).

163. *Id*. at 67.

164. *Id*.

165. *Id*. at 68.

166. C.R.S. §§ 8-3-101, *et seq.*

167. *CF&I Steel, L.P. v. United Steel Workers of Am*., 23 P.3d 1197 (Colo. 2001).

168. *Ziglar*, Commissioner INS (March 22, 2002).

169. INA § 214(b); 8 U.S.C. § 1184(b).

170. INA § 101(a)(15)(E)(i); 8 U.S.C. § 1101(a)(15)(E)(i).

171. INA § 101(a)(15)(H)(i)(b); 8 U.S.C. § 1101(a)(15)(H)(i)(b).

172. INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L).

173. 58 Fed. Reg. 69205-19 (Dec. 30, 1993); 58 Fed. Reg. 69226-28 (Dec. 30, 1993); 58 Fed. Reg. 68926-28 (Dec. 28, 1993).

174. INA § 101(a)(15)(H)(ii)(b); 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

175. INA § 274A; 8 U.S.C. § 1324a.

176. INA § 274(a); 8 U.S.C. 1324(a).

177. INA § 274A(e); 8 U.S.C. § 1324a.

178. INA § 274B 8 U.S.C. § 1324b.

179. *See* 8 C.F.R. 274a.1 (l)(1).

180. 72 Fed. Reg. 45611-24 (Aug. 15, 2007).

181. INA §§ 274A(a) and 274(a); 8 U.S.C. §§ 1324a(a) and 1324(a).

182. 8 C.F.R. § 274a.1(l)(1).

183. *AFL-CIO v. Chertoff* (N.D. Cal. Case No. 07-CV-4472 CRB).

184. INA § 274A(a)(3)(a); 8 U.S.C. § 1324a(a)(3)(a).

185. INA §§ 274(A)(a) and 274(a); 8 U.S.C. §§ 1324a and 1324(a).

186. *See* 8 C.F.R. 274a.1(1)(1).

187. 8 C.F.R. 274a.1(j).

188. 8 C.F.R. 274a.1(j).

189. The SAVE program's website is www.vis-dhs.com/employerregistration.

190. C.R.S. § 8-2-122, HB 06S-1017.

191. The sample affirmation document is available at www.coworkforce.com/lab/Affirmation Form.pdf.

192. C.R.S. §§ 8-17.5-101, *et seq*.