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Managing Within the Law II

reference materials

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Life & Death on the Job
The Law of OSHA, Workers' Compensation & Stress

Safety at Work

Workplace safety is simply a matter of valuing human life. Nationally, in 2007, more than 5,500 employees died on the job and close to 4 million workers suffered job-related injuries or illnesses.

The purpose of the safety laws is to prevent these deaths, injuries and illnesses. In fact, the 2007 injury rate was the lowest since the government started its Survey of Occupational Injuries and Illnesses in 1972.

Or to look at it in a more positive light, the safety rules set by law reduce workplace injuries, thus decreasing your Workers' Compensation and other costs. The 2007 rate of 3.7 fatal work injuries per 100,000 workers was the lowest annual fatality rate ever reported since the Bureau of Labor Statistics started its fatality census in 1992.

There are four kinds of laws that impact safety: safety laws, environmental regulations, criminal sanctions and Workers' Compensation. Those laws will be covered in this section. In the next section, seven hot safety topics will be covered: repetitive strain injuries (like carpal tunnel syndrome), injuries from using computers, AIDS in the workplace, serving alcohol at work, secondhand cigarette smoke, indoor air pollution, and stress claims including constructive discharge.

Safety Laws

The Occupational Safety and Health Act (OSHA) sets the minimum requirements every employer must meet to have a safe workplace. The Act was passed by Congress in 1970. There are also state OSHA's which have their own requirements (see box). The term "OSHA" generally is used for both the law and the Agency it created.

OSHA mandates minimum requirements for two areas: safety and health. Safety violations usually lead to one-time injuries: slips, trips, falls and burns. For example, if an OSHA inspector goes to a construction site and finds a broken ladder in use, that's a safety violation because it could lead to a fall.

Health relates to illnesses from toxic fumes, fibers like asbestos, cotton and dust, and musculoskeletal disorders such as carpal tunnel syndrome. In the health area, OSHA can't keep up with the changes in technology. There are

over 22 million chemicals registered with the American Chemical Society. Every year, 25,000 new chemicals are developed. OSHA has regulations on 650,000 chemicals and every year 30 million American workers are exposed to them.

The following states have their own OSHAs. Their requirements are at least as strict as federal OSHA, and in most cases, more so. Also, federal OSHA sometimes exempts employers with fewer than 10 employees, but state OSHAs may apply to small companies. Check with your local OSHA office.

The states that have their own OSHAs are:

Alaska
Arizona
California
Connecticut (public employees only)
Hawaii
Indiana
Iowa
Kentucky
Maryland
Michigan
Minnesota
Nevada
New Jersey (public employees only)
New Mexico
New York (public employees only)
North Carolina
Oregon
South Carolina
Tennessee
Utah
Vermont
Virginia
Washington
Wyoming

Under OSHA, employers are required to:

provide a safe workplace,
train employees about potential hazards,
keep records of injuries and illnesses,

post warnings and notices and
notify OSHA of major accidents.

Provide a Safe Workplace

The most important requirement of OSHA is called the "general duty" rule. It's the fundamental duty of an employer to provide a safe workplace. "Safe" means free of dangers that could cause serious physical harm to employees.

OSHA's standards generally are recognized as bare minimums. Even if there is no OSHA standard, you have a duty to provide a safe workplace. One court said the precautions you should take are those a conscientious safety expert would recommend.

There are two major ways to make a workplace safe. The first is through engineering. Design the environment to be safe. When that's not possible, the second choice is to provide employees with protective gear. In 2008, OSHA issued a rule requiring employers to pay for workers' personal protective equipment, such as goggles, hard hats, reflective vests, lab coats, and shoe covers.

Some jobs are inherently dangerous, like capping flaming oil wells, cleaning nuclear reactors and handling hazardous waste. The employer must make those jobs as safe as possible.

Training Requirements

The second major OSHA requirement is a "hazard communication program." Employees must be educated about the hazards of chemicals used or produced at work. OSHA requires every company, no matter how small, to have a hazardous communication program.

Hazardous chemicals include any substance that damages skin, eyes or lungs, including combustibles, compressed gas, explosives, carcinogens, corrosives and sensitizers.

If you use hazardous chemicals, your safety program must have three features:

1. Material Safety Data Sheets (MSDS)
2. Written Hazardous Communication Program
3. Training for all workers.

Material Safety Data Sheets (MSDS) are required to be kept at the worksite and available to all workers. The MSDS is provided by the manufacturer of the

chemical. If you use hazardous substances, the MSDS should come with the first shipment. If you produce them, you also must write an MSDS, and send it to your customers.

The MSDS must include the following information:

physical hazards, like flammability and reactivity
health hazards, including symptoms of exposure and medical conditions aggravated by exposure
the primary *routes of entry*
the recommended *exposure limits*
whether it is a *carcinogen*
how to handle safely
control measures such as protective gear required
first aid and *emergency procedures.*

The second requirement for every company that uses hazardous chemicals is to have a written hazardous communication program. You must keep a list of all chemicals used in the plant. You also must have a procedure for labeling every container and pipe that contains hazardous chemicals.

Finally, training is required. Employees must receive training when they're hired, assigned to work with a new chemical, or when a new chemical is brought into production. Training should include everything covered in the MSDS.

Even if you don't use hazardous substances, your state OSHA may require routine safety training. California requires employees to be trained when hired, when new processes are introduced and periodically thereafter.

Ergonomics

According to a 2001 report from the National Academy of Sciences, musculoskeletal disorders (MSDs) are "an important national health problem" causing about 1 million employees to lose time from work each year. They "impose a substantial economic burden in compensation costs, lost wages and productivity," estimated at $50 billion annually.

There are two main types of MSDs: low back problems and disorders of the upper extremities. Back injuries tend to come with manual material handling, frequent bending and twisting, heavy physical work, and whole-body vibration. Rapid work pace, monotony, and low job satisfaction are contributing factors. For problems with the neck, shoulders, arms, hands and wrists, repetition, force

and vibration are particularly important, compounded by high job demands and high job stress.

Work closely with HR and your company's ergonomics experts to make sure you are doing all you can to prevent and reduce MSDs in your workplace.

Record Keeping Requirements

In addition to a safe workplace, OSHA also requires extensive record keeping. There is a $7,000 maximum fine *every* time you don't log an injury or illness.

Only two kinds of employers are exempt from record keeping. Employers in low hazard industries like retail trade, banking, insurance, real estate and law don't have to keep extensive records. Companies with fewer than 10 employees also are exempt from some record keeping. But even these companies may be covered by state OSHA requirements.

OSHA Form 300 is the key document. It is a log of all workplace injuries and illnesses that resulted in medical treatment, work restrictions or death. The annual summary of the log, OSHA Form 300A, must be posted every year for at least three months. Both Forms 300 and 300A must be kept for five years and be made available to employees.

"Medical treatment" means more than first aid. Guideline: if the employee had to leave the work site for treatment, that's more than first aid. A second visit to the company medical department for the same injury usually counts as medical treatment, too.

Even if an injury doesn't result in medical treatment, it must be logged if the employee is placed on work restrictions or transferred to another job. If employees can't do portions of their regular jobs, they should be logged as injuries. Employees do not have to be on official "light duty" to be considered restricted. Even if you only informally accommodate them for a day, it counts.

You should have a policy requiring employees to report every injury, no matter how minor. Supervisors should fill out accident reports for every injury. Since second visits require injuries to be logged, you should have a procedure for following up on all injured employees.

Exposure and Medical Records

If you have any records showing what hazards your employees have been exposed to, you have to keep them for 30 years.

The purpose of this requirement is to allow employees to go back and prove that conditions with long latency periods, like cancer, asbestosis and black lung disease, are work-related.

The most important document to keep is the Material Safety Data Sheet (MSDS). Any tests or reports of monitoring in the workplace also must be kept.

Employee records made by the company's medical staff must be kept under this rule. Also included are pre-employment medical tests, reports of first aid and employee's medical complaints.

Exposure records must be given without cost to employees within 15 days of requesting them. Only employees' own medical records can be shown to them, unless there is a court order.

Management attorneys advise employers to avoid collecting more records than required by OSHA. For example, OSHA does not require companies to give medical exams. But once given, the records must be available to employees and kept for 30 years.

Posting Requirements

A notice entitled "Job Safety & Health Protection" must be posted in every language spoken by at least 10% of the employees. Call your local OSHA office for a copy. Your state OSHA also may have posting requirements.

Every February the company must post the OSHA Form 300A log of injuries and illnesses from the previous year.

Citations received from OSHA also must be posted.

Notify OSHA of Major Accidents

If an employee dies on the job, or if 5 or more employees are hospitalized, every company, no matter how small, has 48 hours to notify the nearest OSHA office.

OSHA Inspections

To enforce its requirements, OSHA conducts unannounced inspections of the workplace. A company representative is allowed to accompany the OSHA inspector.

The company's consent is required before an investigation can be conducted. If you don't consent to an inspection, OSHA is required to get a search warrant. You can fight an inspection if there is no good cause for a search, or you may be able to limit the scope of the inspection. But according to James E Sharp, a former inspector, "Believe me, we'll get a search warrant. And when we come back, we'll be mad."

One company learned that lesson the hard way in a 2007 federal appeals case. OSHA attempted to conduct an unannounced inspection at a workplace, but was turned away. Inspectors returned with a search warrant but they were again denied access. Only after federal marshals were summoned to the scene and threatened to arrest the company's officers ("Somebody will be in chains", said one of the marshals) were the inspectors permitted entry. Not surprisingly, the company was cited for regulatory violations. The company sued, claiming that OSHA should have started a contempt proceeding in court instead of executing the search warrant by force, but the appeals court ruled in OSHA's favor.

There are three types of inspections. *Random* inspections are conducted regularly, particularly of businesses engaged in high-risk occupations. These include construction, mining and chemical manufacturing. You also will be inspected whenever there is a major *accident* or death, and when a *complaint* is filed by an employee.

Employee Complaints

You can't discriminate against an employee who complains to OSHA. Workers aren't obliged to tell you about a problem before filing complaints with OSHA, which can be done in writing, by phone or over the internet. Discrimination in the form of denial of pay increase, loss of promotion, negative performance review, harassment or termination is illegal. This anti-discrimination provision is interpreted broadly by the courts. It covers not only complaints filed with OSHA, but also informal complaints made to the company.

In one case, a complaint made to the media was protected. A newspaper received an anonymous tip that asbestos dust was being blown into the air from uncovered trucks hauling debris from a remodeling site. A reporter went to the job site and interviewed an employee, who allowed his name to be used in the story. After the article appeared, a supervisor asked the employee if in fact he had spoken to the reporter. He said yes, and was fired.

The employee sued for discrimination under OSHA and won. The court said the purpose of OSHA would be undermined if companies were allowed to fire employees who brought safety violations to the attention of *anybody*.

An employee can refuse to work if it is unsafe. The employee must have a reasonable good faith belief that there is an immediate risk of serious injury or death. In one case, two construction workers were working three stories up, using gondolas that continually malfunctioned. For example, pushing the "up" switch caused the gondola to go down.

They complained to the foreman. He was able to get the gondolas running again and ordered the employees back up. They refused to work until the machines were properly inspected by a mechanic. The foreman refused to call a mechanic and fired them. They sued for discrimination.

The court held the employees had a reasonable and good faith belief the gondolas were hazardous, because they had malfunctioned in the past. And the court found that the employer's attitude towards safety was "at best cavalier, and at the worst, reprehensible." The project supervisor expected workers to do their assigned tasks "despite safety concerns." The employees won the case.

OSHA Penalties

The civil penalties for violating OSHA requirements range up to a maximum of $70,000 per willful violation. In addition, if a willful violation of standards results in an employee death, criminal fines up to $10,000 and imprisonment of the responsible manager may be ordered.

In the 1990s, IMC Fertilizer was fined $11.3 million in penalties for safety violations by OSHA. This remains the largest in the agency's history.

Even if you meet all of the OSHA requirements, you still can get an environmental claim, Workers' Compensation case or criminal violation. That's because OSHA doesn't set all the standards.

Environmental Regulations

In addition to OSHA, various environmental laws impose requirements on business. The U.S. Environmental Protection Agency (EPA) enforces laws that regulate hazardous materials. Some states have their own laws controlling substances used in companies. Local ordinances may apply to the transportation and storage of toxics.

These requirements apply to companies not only to protect their employees, but also the general public in the community.

If a company dumps toxic chemicals into the sewer without a permit, that's a violation of the Clean Water Act. It's a violation of the rights of the employees doing the dumping, because they're exposed to hazardous substances and forced to break the law. It violates the rights of the downstream neighbors affected by the fumes, and ultimately the entire community whose drinking water, food supply and air quality are threatened.

There are four major U.S. environmental laws that affect companies, and by extension their employees:

Clean Air Act
Clean Water Act
Resource Conservation and Recovery Act
CERCLA (Superfund)

Clean Air & Water

The Clean Air and Clean Water Acts do not prohibit pollution. They simply require your company to get a permit to discharge pollutants. Permits are given depending on the overall air or water quality. The more polluted the air and water, the fewer permits are given.

The Clean Air Act requires permits for both continuing and one-time emissions. One-time emissions include remodeling buildings, demolition or new construction. These activities may require permits to regulate the release of asbestos into the air. The Clean Air Act also covers vinyl chloride, benzene, beryllium, arsenic, mercury and radionuclides.

The Clean Water Act protects rivers, channels and lakes from both direct and indirect sources of pollution. Dumping toxics down drains, gutters or sewers may indirectly pollute navigable waters and violate the act.

Companies are strictly liable for spills of oil and other hazardous substances into water. Strict liability means the company that owns the chemicals must pay for the clean-up, whether or not it was at fault for the spill.

What are pollutants? Besides the usual hazardous materials, dredged soil, heat, wrecked equipment, rock and sand can't be dumped in water without a permit.

Clean Land

The Resource Conservation and Recovery Act controls the storage, treatment and disposal of waste and garbage if it is ignitable, corrosive,

reactive, toxic or hazardous. If your company generates any hazardous waste and stores it for at least 90 days, the company must have a storage facility permit.

The solid waste disposal act has extensive requirements for underground storage tanks. Many cities and counties do as well. That's why you may see your local gas station digging up its tanks: to comply with underground toxic storage ordinances.

The Act has a manifest or log system that tracks hazardous waste "from cradle to grave." The log must be signed by a responsible person at the company, certifying that all EPA requirements are met. This requirement can lead to employee lawsuits. If employees refuse to sign the log because the company doesn't comply with the law, they are protected from discrimination and retaliation.

Superfund

The three acts above are designed to prevent air, water and land pollution. The Superfund law is for cleaning up existing pollution. Officially it's known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Superfund was passed by Congress in 1980 after families of Love Canal in New York discovered they were living on a toxic waste dump. People were outraged that such a chemical brew could be buried and turned into a housing development. Far from being an isolated occurrence, there are now over 800 sites in the U.S. targeted for eventual clean-up by Superfund.

Superfund holds everyone responsible for cleaning up pollution:

past and present owners of the polluted land,
the companies that operated there and
the carriers that transported chemicals or waste to the site.

Liability is on a no-fault, strict liability basis. There are exceptions for "innocent" site owners and a few others, but it's difficult to qualify for them.

The EPA can order one or more companies to clean up a site, or the government can do it and assess the responsible parties. Superfund taxes the sales of hazardous chemicals to fund government clean-ups.

Public Information

You are required to report spills and releases so EPA will know when clean-up is required. Spills over a certain amount must be reported within **24 hours** to the National Response Center (800-424-8802). Local authorities, especially fire departments, also must be notified.

Superfund has a Community Right-to-Know provision. Companies are required to reveal their inventories of toxic substances to the public as well as to employees. Even employees who don't work with chemicals must be informed if they are on site. To do this, companies that use 10,000 pounds of chemicals per year must submit all MSDS's to local or state environmental agencies, and to local fire departments. There they become public record.

One purpose of this requirement is to assist firefighters in adequately responding to emergencies. Since they must respond to fires everywhere, they have a need to know which chemicals are located where. In recent years, firefighters have had to educate themselves about how to handle chemical emergencies, with a corresponding increase in the level of their professionalism.

Employee Claims

The Clean Air and Water Acts, the Resource Conservation and Recovery Act and Superfund all prohibit firing or in any other way discriminating against employees. All of these acts specify employees can't be discriminated against for filing a complaint under the acts, or for testifying on behalf of another employee.

Like the similar provision under OSHA, these sections have been broadly interpreted to cover even informal complaints. For example, in one case a gas station attendant refused to put leaded gas in a car labeled "unleaded gas only." He said doing so would pollute the air. He was fired, sued for wrongful termination under the Clean Air Act and won.

Employees who have been discriminated against under any of these laws must file a complaint with the U. S. Department of Labor (DOL) within 30 days of the discrimination. The DOL will investigate, and if the charges are found to be true, the company will be sued by the Department.

The general public also can sue when companies violate these acts. However, citizens are not entitled to any money damages. They only can force the company to comply with the law.

Go to Jail

OSHA, the EPA and various state agencies set the minimum requirements all companies must meet. What happens if you don't meet these standards? Worst case, you could go to jail.

In Chicago, three managers ordered an employee to work with toxic chemicals. The barrels were labeled in English and Spanish, but he could not read either language. The managers knew that, but did not inform him of the danger. The employee died. The managers were convicted of murder.

The Clean Air and Water Acts, and the Resource Conservation and Recovery Act, have criminal fines and penalties. Felony convictions can result in jail time. Under the Clean Air Act, unlike most criminal laws, a felony conviction can be based on negligence, without showing intent.

Under a doctrine known as the "responsible corporate officer," a manager may be convicted of a crime even if he or she had no direct knowledge that the law was violated.

Workers' Compensation

Even if you meet all the standards, employees still will get injured and become ill at work. That's where Workers' Compensation comes in. Workers' Compensation gives benefits to all employees who become injured or ill on the job.

By law, Workers' Compensation is liberally interpreted in favor of the employee. That's because if a worker is injured, it is in the service of the employer. The injury would not have happened but for the job.

> ***practical pointers:*** Injuries that require more than first aid, where an employee is sent to a clinic or doctor, should be reported to your Workers' Compensation carrier immediately. An injury report form should be given to the employee within one working day of the accident.

When is an employee disabled? Employees are covered even if they are not permanently disabled and even if disabled only from doing their particular jobs.

For example, an employee with a back condition may be disabled from working some jobs but not others. That employee could be entitled to Workers' Compensation even if not disabled from working in other jobs.

Any injury that occurs on the job may be covered unless injury is "stress caused by my manager."

An employee who has a pre-existing condition that's aggravated while working for you is still covered by your Workers' Compensation. If the pre-existing condition was caused by other employment, the payments are prorated with the other employers. If a pre-existing disability was not caused by other employment, benefits are "apportioned" between the two injuries. You only pay benefits for the new disability.

The "eggshell employee" is covered, too. Someone who is medically diagnosed as supersensitive to cigarette smoke, toxic chemicals or anything else at work may be compensated. An industrial hygienist can come into the building, take samples and say, "I can't measure any amount of toxics." If employees can't work because of their sensitivity to the atmosphere, they may be entitled to Workers' Compensation.

Covered Injuries

Virtually all injuries are covered by Workers' Compensation. For example:

off-site: employees are covered by Workers' Compensation if they were on company business when they were injured. This includes off-site meetings, retreats, and team-building activities. Employees who have car accidents while driving on company business are covered, unless they are injured while running personal errands at the same time. That's called an "unauthorized departure."

telecommuters: covered if injury directly related to working at home. In a state appellate case decided in 2000, a district sales manager who worked from home received Workers' Compensation when he slipped and fell while spreading salt on his driveway. The manager was trying to make his driveway safe for the mailman, who was delivering a large business package.

parking lot injuries: if the employer provides, pays for or suggests using a particular lot, employees are covered from the time they turn into the driveway until they drive out. They're covered for injuries to and from the lot, even if it's three blocks away.

commercial travelers: overnight business trips are covered by Workers' Compensation from beginning to end, including nights and weekends, for reasonably foreseeable activities. Injuries from going to the beach or some other "personal frolic" are not covered.

coming and going rule: employees usually are not covered coming to and going from work. They may be covered if:

they make a detour for the company, like a drop-off at the post office,
they occasionally are held over late or called in early,
they ride in company-provided transportation (including van pools, ride sharing and public transportation vouchers)
they are reimbursed for travel or commuting.

practical pointers: To minimize claims, you should consider not reimbursing employees mileage for commuting. Increase their base pay instead.

No Fault System

Workers' Compensation is a "no fault" system. No fault means employees will receive benefits in the vast majority of cases, even if they were injured as a result of their own negligence or carelessness.

Employees are not eligible for Workers' Compensation only in a few situations:

intoxication: if employees drink or take drugs and then hurt themselves at work, they aren't entitled to Workers' Compensation. The rule is different if the company provides the liquor. That's discussed in the hot topics section.

self-inflicted injuries: employees who deliberately injure themselves are not entitled to compensation. The employer generally is not held responsible for an employee's suicide.

horseplay: an employee who is an innocent bystander injured by others' horseplay is covered. The employee who initiates the horseplay in some states is not covered. In other states, the initiator is covered if horseplay is routinely tolerated on the job.

fights: an employee who is the victim in a fight *about* work may be covered by Workers' Compensation. The aggressor is covered in a few states. Personal arguments are not the responsibility of the company, unless the company condones them.

recreational activities: if events are off-duty and voluntary, injuries aren't covered by your Workers' Compensation.

practical pointers: People who play on a company-sponsored team should sign a statement they are voluntarily participating, especially if the captain of the team is their boss. Company-provided basketball courts, showers and gyms should have legal notices posted that all use is considered voluntary.

holiday and social activities: if attendance is voluntary, injuries aren't covered by Workers' Compensation. Avoid saying things like "We want 100% participation this year" or even "Everyone is going to be there."

There may be other times when employees' fault will prevent them from winning Workers' Compensation benefits. Check your state's Workers' Compensation statute.

Exclusive Remedy Rule

So far, we have been talking about no-fault from the employee's side. No-fault also works the other way. Workers' Compensation applies even if the company was negligent. The company generally will not be penalized for having an inherently dangerous work environment.

One exception: companies are penalized for serious and willful misconduct. If the employer physically assaults an employee, hides the results of medical exams from employees or fails to follow general industry safety standards, it will be penalized.

Depending on your state, the penalty may be an increase in Workers' Compensation benefits, or the penalty could be exempting the employee from the "exclusive remedy rule."

What is the exclusive remedy rule? That means Workers' Compensation is the only remedy for all workplace injuries. Employees cannot choose to sue in court if they are injured. They only can get Workers' Compensation for their injuries, including death.

But when the lives of employees are deliberately endangered, they aren't limited to Workers' Compensation benefits. They can sue in court for personal injury damages, which can run into millions of dollars. This is allowed because if Workers' Compensation was the exclusive remedy in such cases, there would be no disincentive for employers to risk employees' lives.

Generally, these cases involve some sort of danger created by the employer and a misrepresentation by the employer of the seriousness of the danger. For instance, employees were allowed to sue an employer that modified a

smokestack, periodically turned off the ventilation systems, and then lied to employees about the dangerousness of toxic substances and the need for safety devices. Concealment of known problems can cause liability, too, as in the case of the airline that cut back on safety and maintenance to save money, and was sued by the widow of a co-pilot killed when an engine malfunctioned. Employers who remove safety devices or warning labels have also removed their immunity from suit, and in 2003 a state supreme court held that an employer that intentionally deceived OSHA and deliberately failed to correct hazardous conditions in violation of an OSHA directive could be sued by the survivors of a worker who had been suffocated on the job.

Employees often try to get around the exclusive remedy rule because of the limited payments from Workers' Compensation. One way is by filing third party suits. Rather than suing the employer, the employees sue the manufacturer of the product that injured them at work.

According to newspaper accounts, electronics workers in New Mexico became disabled after being exposed to toxic solvents by their employer. They got Workers' Compensation. Then they filed a multi-million dollar third-party suit against the chemical company that made the solvents for failing to adequately warn them of the dangers.

Defending Workers' Compensation Cases

Workers' Compensation benefits are paid by the employer through insurance or by self-insuring. Like other forms of insurance, Workers' Compensation premiums have skyrocketed. Many companies now use aggressive cost cutting techniques to keep down Workers' Compensation costs. This is called "case management." It means reducing the amounts paid in benefits by thoroughly investigating and vigorously defending these cases.

For example, we said earlier that benefits may be increased if an employer engages in serious and willful misconduct. It works the other way, too. If employees refuse to use safety equipment, they are engaging in serious and willful misconduct. You can fight to get their benefits reduced or denied.

Case management is necessary to weed out frivolous claims, but you may not want to lose sight of the human side.

Payments & Benefits

Workers' Compensation payments are a proportion of the employee's regular salary up to a maximum. Theoretically the employee should have no salary loss. However, in New Jersey, for example, the maximum payment is less

than $750 a week. Obviously, this would not fully compensate many employees for their lost salaries.

At some companies, Workers' Compensation payments are the only disability payments employees receive. Companies that provide additional disability benefits may deduct any Workers' Compensation received by employees.

How long the payments last depend upon the "rating." A rating is the percentage of jobs in the overall work force that a person is excluded from because of the disability, combined with age, education, experience and skills. A 50% permanent disability means the employee will never be able to do half of the jobs in the workforce.

A person who is 100% permanently disabled would receive the maximum benefit. A person less disabled is given a rating to determine how much money their disability is worth. Workers' Compensation lawyers actually have a book that places a dollar value on each type of disability. For example, in one state in 2008, the loss of an eye was "worth" $69,000.

If the employee dies and has dependents there is a death benefit. This can be paid out at the regular weekly rate or taken as a lump sum.

Workers' Compensation also pays the employee's medical bills for that injury. If the employee needs lifetime treatment for a workplace injury, medical bills are paid. If the injury is cured but then flares up again years later, Workers' Compensation may pay for the medical treatment.

Vocational Rehabilitation

A new Workers' Compensation benefit available in some states is vocational rehabilitation — retraining employees in new jobs after they become disabled from their old ones. Voc rehab starts by assessing the employee for current skill level, trainability and interest in new fields. Employees often require pre-training before they're able to enter a regular program.

The voc rehab program itself may take up to one year. Throughout that time, the employee will be receiving Workers' Compensation benefits. All tuition, fees and books are paid.

> ***practical pointers:*** Vocational rehabilitation can be expensive, especially when outside services are used. Every organization's voc rehab costs should be managed and controlled.

There are stories in California about hundreds of thousands of dollars paid out for elaborate programs that turn menial laborers into chief executives. But vocational rehabilitation is not the lottery. Its purpose is not to give people their dreams, but to give them a living -- a living comparable to the one they had at the time they were injured.

There may be no legal requirement under your state's Workers' Compensation to provide jobs to your employees after retraining. But under the Americans with Disabilities Act, you are required to reasonably accommodate disabled employees.

Your state also may have tax credits, insurance premium rebates and other incentives for re-employing disabled workers.

No Discrimination

While employees are out on Workers' Compensation, you must treat them the same as anyone else with a disability. For example, if the company allows employees disabled away from work to have one-year disability leaves with their jobs guaranteed, then the same rights must be given to employees on Workers' Compensation.

You can't discriminate against an employee who files for Workers' Compensation benefits. In 2001 a jury verdict of more than $2 million—including $1 million in punitive damages—for harassing, then terminating, an employee who filed a worker's comp claim was affirmed on appeal.

There are a few legitimate business reasons. One is if the position was eliminated in a general cutback, although the time off work generally can't count against the injured worker's seniority.

You also may be able to dismiss employees who are on Workers' Compensation if they are unable to return in the foreseeable future after exhausting the company's standard leave policy. If you have no positions available for an employee who becomes permanently disabled, you may be able to refuse to reinstate them.

Check with a Workers' Compensation attorney before terminating an employee who is receiving benefits.

Your Responsibility for Safety

Your first responsibility as a manager is to prevent injuries and illnesses. You as manager are responsible for making your area a safe place to work. Prevention is the key.

Training employees in safe work procedures is critical. More OSHA citations are given for lack of training than for any other cause. As Jim Chung, a CalOSHA inspector said, "Ignorance is the greatest hazard in the workplace."

The days are gone when safety training is showing a film on how to lift boxes. You need to address the dangers of needless stress, secondhand cigarette smoke and computer terminals through training, too.

Encourage employee suggestions and reports. If an employee complains about a hazard, call the safety department or outside industrial hygienist whether or not *you* think there is a problem. You are not an expert.

If you see any hazards, report them immediately to your company's safety department, personnel or top management. Let everyone in the area know about them. Post signs and blockade dangerous areas.

Be prepared for emergencies. Know the evacuation routes. Learn CPR. Have the emergency telephone number listed on all phones, and be sure the complete number is listed, for example, 9-911.

In the case of an accident, after you call the ambulance, call safety, security or personnel immediately.

It is your responsibility as a manager to document accidents. You must be an investigator. Who are the witnesses? Get statements from them that day. Reconstruct the scene. Leave everything where it is. Take pictures or make sketches showing the positions of the victim, witnesses and equipment.

Once you have reconstructed the scene, secure any machine or tool involved. Put it in storage or take it out of production until it can be examined by the OSHA investigator or by the Workers' Compensation claims adjuster. You must preserve the scene of the "crime," because if you don't, you're tampering with evidence.

The Benefits of Safety

The Boise Cascade Corporation's Workers' Compensation insurance claims and premiums were rising significantly. Their insurance liability one year was $13 million.

The company decided to do something about it. They instituted safety as a corporate goal. All managers were rated for safety on their performance appraisals. After five years they reduced their liability to $2.4 million.

A safe workplace has bottom-line benefits. But there are more important values than reducing Workers' Compensation payments. If you can prevent one person from dying, it's worth it.

Hot Issues

There are a number of other hot issues in safety law today.

Computer Use

One hot issue is computer monitors or video display terminals (VDTs). To give you an idea of computers' impact, one-third of the editors and reporters at the *Fresno Bee* newspaper claimed they got carpal tunnel syndrome or other repetitive motion injury when new computers were introduced. In addition to claiming Workers' Compensation benefits from the company, some of them filed a third-party suit against the computer maker alleging an inherently dangerous keyboard design.

To prevent these injuries, some cities and states have adopted or are considering computer use ordinances. Many are modeled on the 1988 ANSI standards (the American National Standards Institute). ANSI standards are not law, but recommendations. If you want to avoid injury, you and your employees should follow these standards whenever using a computer.

A large number of ANSI standards involve ergonomics, the correct design and placement of objects to prevent muscle strain. One of the ANSI standards calls for a detachable keyboard. The keyboard design, the shape of the keys and the distance between keys can affect hand, wrist and arm position. No one design is best. Experiment with different keyboard and mouse positions to find the one that is the most comfortable.

There should be a ninety degree angle between the upper arm and lower arm. The lower arm should be even or slightly above the keyboard. The keyboard rest should be adjustable up and down to create the correct angle.

The wrists should be even with the hands. In the days when we used typewriters, we needed to have enough force in our hands to press down the keys. To get that force, we held our arms even or above our wrists. But with computers, we barely have to touch the keys. We tend to get lazy and rest our wrists down below the hands. That puts stress on the carpal tunnel.

> ***practical pointers:*** One way to prevent this is to use a wrist rest. There's no need to buy a specially designed computer wrist rest. A small, rolled up towel will do. Contrary to its name, a wrist rest is not for resting your wrist. It is simply a guide. Your hands and wrist should float over the wristpad and keyboard.

The back of the chair should adjust so it will fit most comfortably in the small of the back. The chair needs to be adjustable for good posture. When you were growing up did your mother tell you to have good posture? Well, now it's an ANSI standard.

The screen must be between eye level and sixty degrees below eye level. The screen also should be adjustable, up and down. The document should be in front instead of to the side. The monitor screen should be twenty-two inches from the eyes to eliminate eye strain.

The National Institute for Occupational Safety and Health (NIOSH) is studying radiation from monitors. Very low frequency (VLF) and extremely low frequency (ELF) radiation is emitted by monitors. The question is whether this VLF and ELF is dangerous to users.

If VLF and ELF radiation are hazardous, we would expect to see it in the miscarriage rate of pregnant users. In the NIOSH studies there was no increase in miscarriages, premature deliveries or low birth weight in babies among telephone operators who used VDTs as compared to those who didn't. Studies are continuing on the effect on the eyes and other possible hazards.

To prevent eye strain, the ANSI standards suggest reducing glare. The user should be able to position the monitor so it doesn't reflect light, or place anti-glare screens over the display. The lighting in the area should be between 200 and 500 lux.

Perhaps the most important ANSI standard is to give a 15 minute task break at least every two hours. NIOSH recommends a 10-minute break every 2 hours,

or even every hour, if there is a high visual demand or repetitive work task. During this time, the user should get up, get away from the computer and not do any other close work. Part of the purpose of the break is to refocus the eyes. They should focus on something far away until able to see it clearly.

During this break, the hands, wrists, shoulders and neck should be exercised. Shaking the hands, stretching the wrists down and back, shrugging the shoulders and rolling the neck all are helpful.

In a study published in the May, 2000 issue of the scientific journal *Ergonomics*, NIOSH found that strategic work breaks reduced eyestrain and upper-body discomfort, without decreasing productivity.

AIDS in the Workplace

AIDS became a hot issue in the early 1980's. It still is. But the nature of the debate has changed.

When the HIV virus first appeared, many employers reacted hysterically. At that time, little was known about the disease by the general public. One of the first cases involved a young man who had worked for Raytheon Company for several years. He entered the hospital with pneumonia and was diagnosed as HIV positive. One month later, he was released and attempted to return to work. The company refused to reinstate him. He sued for disability discrimination and won.

Since then, we all have learned that HIV can't be transmitted under most circumstances in most workplaces.

> ***practical pointers:*** Since HIV is transmitted through blood, you should use universal precautions if employees injure themselves and begin bleeding. Half the people who are HIV positive don't know it. Use latex gloves before treating an employee. Gloves should be standard equipment at all First Aid stations.

The other side of the equation is protecting employees from customers or patients who are HIV positive. To do that, OSHA issued standards in 1991, revised in 2001, for blood-borne diseases, including HIV, AIDS and hepatitis. They apply to the estimated 5.6 million workers in health care, public safety, funeral homes, linen services and other jobs where there is a risk of exposure.

The standard requires those employers to have written infection control plans. Free hepatitis B vaccinations must be given to all employees who may

be exposed to blood on the job. Free follow-up care must be given to an employee who is infected on the job.

Protective gear such as gowns, gloves and other equipment must be given to employees. Puncture-resistant containers must be provided for needle disposal, and employers must keep a log of all needle sticks.

Employers have the responsibility to prevent the spread of AIDS, while not discriminating against people with the disease.

Alcohol at Work

Friday afternoon beer busts are a common occurrence in many high tech Silicon Valley companies. At traditional law firms, the senior partner invites other attorneys into his office for an evening sherry sip. At a construction site, the boss and employees hang around the lot drinking beers after work.

The philosophy behind all of this drinking is that it benefits the bottom line by encouraging informal networking.

It also creates legal liabilities. If the company provides free booze and drunk employees injure themselves, they are entitled to Workers' Compensation. Because the drinks were free, the employees did not voluntarily become intoxicated.

If a company party is completely voluntary and the employer charges for drinks, the company is not liable for Workers' Compensation when employees injure themselves.

Whether or not the company provides free booze, if a drunk employee injures another employee, that employee can get benefits. And if the drunk employee leaves the party and kills or injures someone else, the company may be held liable the same as any other social host or bartender.

It depends on your state laws. The Idaho Supreme Court held in 1991 that a company was liable for the death of a pedestrian killed by an employee who got drunk at an office party. A man who got drunk on a business trip, passed out drunk in the cold, and had to have his fingers amputated because of frostbite was entitled to Workers' Compensation, according to a 2001 decision from the Wisconsin Supreme Court.

> ***practical pointers:*** Your responsibility as a manager is to prevent accidents. Don't push alcohol on others. Monitor your own and your

employees' drinking. Those who seem intoxicated should not be allowed to work or drive. Call a cab if necessary.

Secondhand Smoke

Smoking is another hot issue. As of this writing, there is no U.S. law prohibiting smoking in the workplace. However, the National Institute for Occupational Safety and Health (NIOSH) concluded in 1991 that secondhand smoke causes cancer and possibly heart disease. In 1994, OSHA proposed regulations restricting smoking in the workplace, but they were never adopted.

Forty-one states and the District of Columbia require smoke-free indoor air in their government work sites, and D.C. and 20 of the states extend that requirement to private employers, as well. In addition, many counties and municipalities limit or ban smoking in the workplace. Check with your local government to see if any such laws apply to you.

Even if there is not a smoking ordinance in your area, you should be sensitive to the complaints of nonsmokers. That's because employees who become disabled from breathing secondhand smoke at work can file claims for Workers' Compensation. They also may be able to file complaints with OSHA if the amount of carbon monoxide in the workplace exceeds allowable levels.

In recent years, nonsmoking employees have been successful in making two other types of claims to get more than Workers' Compensation benefits.

The first type of claim is for intentional infliction of emotional distress. Most states have laws that prohibit any person from intentionally acting in an outrageous manner to cause emotional distress. What does this have to do with smoking?

In one case, an employee complained to his supervisor about the smoking of his co-workers. After he complained, the supervisor moved the employee's office into an area with more smokers. His co-workers deliberately sat next to him at meetings and blew smoke in his face. In short, he was retaliated against for complaining. The court said that was outrageous and awarded him damages for intentional infliction of emotional distress.

The second type of claim is for disability discrimination. Employees who are sensitive to cigarette smoke are disabled. Employees who are physically disabled must be reasonably accommodated. This means the company must prevent smoke-sensitive employees from being exposed to cigarette smoke.

In one case, two women who were sensitive to secondhand smoke complained about the smoking of their co-workers. In response to their complaints, the employer moved them into a smoke-free office, installed smoke filters at the desks of smokers, improved the ventilation system and requested that employees not smoke near them.

Despite these efforts, the women still were affected by cigarette smoke. The employer refused to do more. The women sued for disability discrimination and won. The court said the employer did not reasonably accommodate them to prevent the injuries from occurring. Specifically the court said the employer could ban smoking from the office entirely.

> ***practical pointers:*** Many employers have nonsmoking buildings, and allow employees to go outside to smoke. To maintain the morale of nonsmokers, you should not allow smokers to exceed the usual amount of break time in order to smoke.

What about smokers' rights? About half of the states protect smokers as a group, and prohibit discrimination against smokers in hiring, promotions and other employment decisions.

Some smokers are addicted to a drug, nicotine. Why shouldn't they receive the same protections at work as other drug addicts?

The Americans with Disabilities Act requires companies to reasonably accommodate employees with drug addictions only if they are rehabilitated. If an employee enters a nonsmoking program, you might be required to give time off work as needed by the program. You are not required to accommodate the smoking, only the rehabilitation. Michigan's courts have held that nicotine addiction is not a disability under either Michigan law or the ADA.

These all may be valid arguments, but they are assumptions. These "facts" may not be true in a given case. One company refused to hire smokers on the grounds they were unhealthy. But when we looked at actual attendance, the smokers had better records than the nonsmokers! If you perceive smokers as disabled, refusing to hire them would be discrimination on the basis of disability.

More low-income people smoke than middle or high-income groups. Disproportionately more Blacks and Hispanics have low incomes. A 1998 study found Asian men smoke more on average. A policy of not hiring smokers would discriminate on the basis of race.

A policy against hiring people who smoke is difficult to enforce without invading their privacy. Are you going to follow employees home and look in the

windows to see if they're smoking? For these reasons, you should not refuse to hire smokers. Just regulate their smoking at work, and require everyone to meet your break, attendance and sick leave policies.

Indoor Air Pollution

Poor air quality always has been an issue for manufacturing, construction and mining employees. Today, it affects office workers, too.

According to the EPA, "sick building syndrome" occurs when a building's occupants have eye, nose or throat irritation, sensitivity to odors, dizziness, nausea, difficulty in concentrating, fatigue and headaches.

In sick building syndrome, the specific cause of these symptoms is not known. And most of the symptoms disappear shortly after people leave the building.

Another condition is "building related illness." This is where people have coughs, chest tightness, fevers, chills and muscle aches. These symptoms can be traced to an identifiable cause. For example, Legionnaires disease is caused by bacteria that lodge in heating, ventilation, and air conditioning (HVAC) systems.

People who suffer from building related illnesses don't recover when they leave the building. They may be ill for a long time or die.

A Harvard Medical study found that 27 out of 47 people working in one building were infected with tuberculosis from one employee. By recirculating the air, the HVAC system spread the disease throughout the building.

Radon and asbestos cause long-term diseases which occur years after exposure. They are another source of indoor air pollution. According to the World Health Organization, 30% of new and remodeled buildings worldwide have indoor air pollution.

Sick buildings are caused by poor ventilation, such as:

indoor sources of pollution not properly vented,
outdoor pollution entering, or
bacteria contaminating the HVAC system.

Indoor sources of pollution are paints, solvents, adhesives, pesticides, carpeting, upholstery, plywood, copy machines, laser printers, cleaning supplies, tobacco smoke, space heaters, woodstoves and gas stoves.

Another indoor pollution problem is noise. High noise levels are extremely hazardous. Even low levels of noise can cause headaches, irritation and other symptoms of stress. OSHA has set standards for allowable noise levels.

> ***practical pointers:*** The most important step in preventing sick people is to have a well-ventilated building.
>
> The EPA recommends companies routinely maintain their HVAC systems. The ventilation system should process 20 cubic feet of air per person per minute. Replace water-stained ceiling tile and carpet. Institute smoking restrictions. Vent rest rooms, copy rooms and print shops.
>
> To prevent sick building syndrome, treat every remodeling job like a chemical spill. Use toxics in well-ventilated areas when the building is empty. Allow time for new building materials to off-gas before returning to work.

Stress

One of the hottest safety issues today is job stress. Henny Youngman said, "My nephew has an industrial disease: work makes him sick." It used to be a joke, but today sometimes it's fatal.

In Japan, ***karoshi***—death from overwork—is recognized as a fatal breakdown caused by long hours, skipping vacation and holidays, lack of rest, and long-term stress. An estimated 10,000 workers fall victim to the syndrome each year, according to the National Defense Council for Victims of Karoshi. This is comparable to the number of annual motor vehicle deaths in Japan.

Stress kills others besides those who are stressed. It's no longer news to hear of disgruntled employees returning to work and shooting their co-workers. They are victims of stress.

According to the American Institute for Preventive Medicine, stress is responsible for two-thirds of all doctor visits and plays a role in our two major killers -- heart disease and cancer.

Stress is sometimes referred to as a yuppie disease. But according to a study at Carnegie Mellon University, as income increases, stress decreases. The people most likely to be stressed had incomes under $50,000, or were women or minorities.

Stress claims for Workers' Compensation are increasing. In a ten-year period the number of stress claims filed in California rose by 700%. During that same time the number of other Workers' Compensation claims rose by only 25%.

If an employee is stressed and becomes disabled, in about 25 states including California a claim for Workers' Compensation can be filed. It's just like any other disability. Hypersensitive victims are covered. If they are disabled by stress, they're entitled to Workers' Compensation, as long as it's job related.

In a 2004 federal appellate case, a man who had a hereditary neurological disorder that caused tremors was teased and harassed by his co-workers, who called him "Shake and Bake" and played practical jokes on him. The harassment increased the man's stress level, which in turn made his tremors worse. The court affirmed an award of permanent workers' compensation disability benefits, finding that the ridicule he had suffered had "aggravated, accelerated, and exacerbated" his medical condition.

In perhaps the most extreme case, a woman retail clerk felt her boss was harassing her about the job. He rated her too low, she thought. He gave her jobs that weren't as good as the jobs he gave others. As a result, she became stressed, went to a doctor and was put on medical leave.

She applied for Workers' Compensation benefits. At trial the company proved she was not harassed. The manager treated her the same as any other employee, the jobs he gave her were the same and her performance evaluations were accurate.

But the judge said even though she wasn't harassed, by the mere fact she felt harassed, she was stressed, and therefore entitled to Workers' Compensation insurance.

In fact, stress injuries arising from a supervisor's good-faith criticism of an employee's work performance are compensable in some states, including New Hampshire and Michigan. Other states, including Connecticut, Colorado, Maine, Massachusetts, Missouri, New Mexico, New York, North Dakota, South Carolina, Texas and Utah, have amended their Workers' Compensation laws to bar claims for stress resulting from an employer's good-faith actions.

A man accepted a demotion because he was having trouble handling criticism and conflicting directions from his supervisors. Several months later, he committed suicide, and a 2004 state appellate court held that his widow was proved that he suffered from a "work-related pattern of mental deterioration that culminated in suicide" and was therefore entitled to workers' compensation death benefits.

Remember, it's a no-fault system. In California, the only defense is that less than 50% of the stress was caused by work, and that's sometimes difficult to prove in these cases.

If stressed employees remain on the job, their work may be affected. Stress can lead to absenteeism, mistakes, accidents, low morale, theft and substance abuse. Stressed employees can be disciplined, up to and including termination, if they don't do the work assigned and obey all company rules.

At the same time, if they are disabled by stress, they must be reasonably accommodated. The Americans with Disabilities Act (ADA) may require giving them part-time work schedules.

The ADA also says you should restructure jobs. You can imagine the demands employees could make to eliminate the stressful parts of their jobs. But you don't have to eliminate any essential functions of the job, no matter how stressful they are. If stress is a normal part of the job, someone has to do it. The federal appellate courts have consistently ruled that transfer to a stress-free job is not a reasonable accommodation.

Likewise, an employee's inability to get along with a particular co-worker or supervisor is not a protected disability. A worker who could perform well for someone else can do the job, after all, and is simply not disabled. Every federal appeals court that has considered the question has concluded that change of supervisor is NOT a reasonable accommodation.

Constructive Discharge

Stress claims also arise in lawsuits for constructive discharge. In constructive discharge, the manager harasses employees until they are forced to quit. The issue in these cases is whether a reasonable person in the same situation would feel forced to quit.

Courts have found constructive discharge in cases of sexual and racial harassment, or where other laws were broken. An example is a violation of a safety regulation. If employees quit because OSHA standards are violated, that's constructive discharge.

What if managers yell and scream at their subordinates? Is yelling a good reason for the reasonable person to quit? It probably depends more on what is yelled. Yelling alone may not be enough.

Where there hasn't been discriminatory harassment or violation of some other law, where there has been only work-related harassment, the courts have been reluctant to find constructive discharge except in outrageous situations.

Here's an example of this kind of outrageous behavior. Chris Panopulos had a Stanford MBA. He worked as an accountant for Westinghouse for 32 years.

One day, without warning, he was permanently relocated. His job title wasn't changed, but he was assigned to work in the archives, stacking 150 pound boxes and retrieving records. Overnight he went from doing paperwork with others in a white collar environment, to performing manual labor alone in a filthy warehouse with no toilets or drinking water.

The court said that Chris could sue for constructive discharge if he quit immediately after being assigned to the warehouse.

Can employees sue for work-related harassment if they aren't forced to quit? It depends on your state.

Texas allows suits by employees for intentional infliction of emotional distress. In one case, the employer demoted an employee with 30 years experience as an executive to an entry-level janitorial position. As a result, he suffered severe depression but did not quit. He was able to sue in court for his emotional distress.

Surprisingly, on the other extreme is California. There, if the emotional distress is a result of demoting or promoting the employee, criticizing work, arguing about grievances or routine termination, the employee's exclusive remedy is Workers' Compensation. The Texas case probably would be seen by the California Supreme Court as the kind of behavior that "normally occurs in the workplace."

Manager's Responsibility for Stress

You have the duty under OSHA to provide a safe workplace. Stress is a workplace illness just like carpal tunnel syndrome. Both are the result of minor trauma over and over to the same spot.

You wear down, and finally break.

Experts say that most employees who become violent at work show signs of stress long before the shooting starts.

In September 1989, an employee in Louisville, Kentucky, killed 7 of his co-workers because he was angry about being put on disability leave. Another employee said, "This guy's been talking about this for a year."

His stress problems may be why he was placed on disability. The employer in this case was in a no-win situation. But perhaps early referral to an employee assistance program or outside counselor could have prevented this tragedy.

Most stressed employees don't end this way. In fact, most stressed employees will solve their own problems. But they may solve them by drinking, going out on stress leave or quitting. These options aren't productive for the company or the employee.

Managers should not create needless stress for employees. But as we've seen, sometimes employees feel stressed even when there is no objective evidence of a stressful environment.

According to a comprehensive study, the primary cause of employee stress is a feeling of a lack of personal power. Personal power is a sense of inner security that you can meet whatever challenges you face. To minimize the amount of stress in the workplace, and to develop healthy responses to the stress there is, consider implementing these empowering and stress reduction techniques for you and your employees:

admit that there is stress
communicate openly
use time management techniques
plan projects
train employees to be adaptable
avoid yelling, sniping, sarcasm
reduce caffeine, sugar, fat, nicotine and alcohol at work
encourage employees to work undisturbed when needed
create a quiet room for escape
go for a walk around the building
take deep breaths
encourage exercise
celebrate achievements healthily (e.g. not by drinking alcohol or eating cake)
bring in community wellness programs
evaluate managers on stress reduction habits

You also should be sensitive to employees' clues about stress off the job.

There is a fine line between invading someone's privacy and managing their stress. Your bottom line should be that you don't care why employees are stressed in their private lives. You want them to be happy at home because they will be productive at work.

As a manager, you are limited in what you can do. You can listen sympathetically to small problems (for a while, anyway). You don't want to give advice. For major problems, the employee should be referred to counseling.

How do you make a referral without creating more problems? Joan Holland, an employee assistance therapist in Palo Alto, calls her service the Distinguished Employee Program. Imagine how easy it would be to tell the employee, "I want you to enter our Distinguished Employee Program so you can become successful here." So much better than, "You need a shrink!"

And don't confuse EAP with performance management. Never force an employee into EAP or make EAP part of a required employee performance improvement plan.

To refer employees, you want to state the *problem*, tell the employee the *manager's role*, ask for *employee's suggestions* and *make the referral.* Consider these approaches:

> *problem*: "You seem a little preoccupied" – "You don't seem to be focusing on work" – "You aren't performing up to your usual high standard"
>
> *manager's role*: "It's not my business what happens at home, but I am concerned about your work" – "I don't want to get involved in your private life, but I do want to help you"
>
> *employee's suggestions*: "Is there anything I can do to help you resolve your situation?" – "What can I do to help?" – "What would you like me to do?"
>
> *make the referral:* "Would you like to talk to someone about it?" – "I can give you time off to talk with a counselor if you'd like" – "Do you want to use my office to call the EAP program?"

Stressed employees may be inevitable. You can reduce the number and severity of stress claims by being sensitive to the needs of the whole person.

Valuing People with Disabilities
The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was passed by Congress in 1990. It covers companies with 15 or more employees.

The law protects people who have a permanent (long-term) and substantial impairment of a major life function, like walking, seeing or breathing. It does not cover minor or temporary disabilities.

The ADA covers virtually every type of mental and physical disability.

It also applies to people who have a history of being disabled. For example, a woman manager who had breast cancer returned to work with the disease in remission. She was not disabled. But her boss said she would never get anywhere in the company because she was "weak." This is discrimination based on her history of disability. However, an employer is entitled to enforce its neutral conduct rules, even if that adversely affects a disabled employee, as the U.S. Supreme Court ruled in a 2003 case. The employee had tested positive for cocaine on the job, admitted that his behavior violated company policy, and resigned. Two years later he reapplied, attaching reference letters from his pastor and an Alcoholics Anonymous counselor, saying he was in recovery. The employer rejected him, based on its blanket policy of refusing to rehire all former employees who had violated company policy. The employee sued, claiming he had been discriminated against based on his status as a rehabilitated drug user. But the Supreme Court said the employer's no-hire policy was a legitimate nondiscriminatory reason for its action.

People who are mistakenly perceived as being disabled also are protected. For example, an employer might assume that people who are obese can't keep up the pace. This is an assumption based on stereotypical perceptions. If an employer discriminates on this basis, it probably is illegal under the ADA.

Finally, people who take care of or are related to people with disabilities are covered. For example, if an employer knows that an employee does volunteer work with terminal AIDS patients, it cannot fire that employee because of his association with AIDS patients. Or, suppose an applicant tells her interviewer that her husband is disabled. If she is the most qualified, she must be hired; the employer cannot simply assume that she will have to miss work, leave work early, or both, and cannot consider the impact of adding a disabled dependent to its insurance plan. However, if a non-disabled employee violates a neutral employer policy on attendance or tardiness, he or she can be

dismissed, even if the reason for the absence or tardiness is to care for a disabled relative or friend.

If an employer is unaware of a disability, it cannot be accused of discrimination and has no duty to reasonably accommodate. In a 2008 federal appellate case, a deaf applicant lost his case where the person screening applications just reviewed resumes and compared qualifications. While he was not selected for an interview, the court held that since the cut came before the employer knew the applicant was deaf, it could not be considered discriminatory.

State Laws

Some states also protect people with disabilities. These states may have a broader definition of disability than the ADA. California, for example, protects people with impairments that limit, but don't substantially limit, a major life function. New York and New Jersey don't require any life function limitation. In reading the following, remember your state may have a broader definition. Always check with an attorney before taking any adverse action against a person with a disability.

Who Is Covered?

Under other employment statutes, such as the Age Discrimination in Employment Act and Title VII of the Civil Rights Act, the protected characteristic is easy to find. For instance: Is the employee male or female? Under or over 40? What is his/her religion? National origin? Race?

It's not so easy under the ADA.

The statute bars employers from discriminating "against a qualified individual with a disability because of the disability of such individual…" or because the individual has a history of disability, the individual is associated with someone with a disability, or because the employer thinks the individual is disabled. Unlike unlawful discrimination under traditional civil rights laws, violations of the ADA include not only adverse action motivated by prejudice or fear of disabilities, but also include the employer's failure to make reasonable accommodations of disabilities. However, the employer's obligation to make reasonable accommodations stops when the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."

So what is a disability? The ADA defines it as follows: "(A) a physical or mental impairment that substantially limits one or more of the major life activities

of [an] individual; (B) a record of such impairment; (C) being regarded as having such an impairment." (Different definitions of disability are used in Workers' Compensation laws, the Family and Medical Leave Act, the Rehabilitation Act, and Social Security Act.)

When is a Physical or Mental Impairment a Disability?

The first step in evaluating an ADA issue is deciding whether the person in question is disabled within the meaning of the statute.

While Congress enacted the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," the law was not interpreted broadly by the courts. Instead, the Supreme Court emphasized the idea that careful individual assessments had to be made in every case as to whether a person had a disability under the ADA. As a result, an employee's ability to prove that he or she had a covered disability under the ADA soon became a central point in almost every ADA case. Physical and mental impairments as serious as epilepsy, muscular dystrophy, diabetes, cancer, and schizophrenia were all held by courts not to meet the statutory definition of "disability".

The Supreme Court narrowed coverage under the ADA in three primary ways:

- In 1999, by saying that courts must take into account mitigating measures such as glasses, medication, and prostheses, when determining whether a person is "substantially limited in a major life activity". In one such case, a man who was blind in one eye was held not to be disabled, since his brain had learned how to compensate for his monocular vision.

- In another 1999 case, by requiring people who allege that they are regarded as being substantially limited in the major life activity of working (because an employer has refused to hire them for a job based on an actual or perceived impairment) prove that the employer believed them incapable of performing not just the one job they had been denied, but also a broad range of jobs.

- In 2002, by applying the term "substantially limited" in a very strict manner and saying that the term "major life activity" covers only activities that are of "central importance to most people's daily lives." In that case, a woman who been fired because her job-caused carpal tunnel syndrome made it physically impossible to do her job was nonetheless held not to be disabled in the major life activity of performing manual tasks, since she could still bathe, brush her hair, get dressed, cook, garden, and do other daily chores.

During the ADA's first fifteen years, repeated studies showed that employers won more than 90% of the reported cases. Most of the time, the court never got to the issue of whether the employer reasonably accommodated a worker's physical or mental limitations, but threw the case out because the employee was unable to show that he or she had a covered disability.

Congress reacted to the courts by passing the Americans with Disabilities Amendments Act of 2008 (ADAAA), which went into effect on January 1, 2009. The ADAAA retained the definition of "disability" as a physical or mental impairment that substantially limits a major life activity of an individual. But Congress made it clear that it wanted to cover more people. The new law provides that the definition of disability must be construed in favor of broad coverage.

The ADAAA added a definition of "major life activity", which the original ADA did not contain. These activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, as well as the operation of major bodily functions, such as functions of the immune system, normal cell growth and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

The ADAAA also provides that, except for ordinary eyeglasses or contact lenses, the ameliorative effects of mitigating measures should not be considered in determining whether an individual has an impairment that substantially limits a major life activity. And it states that that an impairment that is episodic, such as epilepsy, or in remission, such as cancer, is a disability if it would substantially limit a major life activity when active.

What Congress wanted to do was shift the emphasis in ADA cases away from fighting over whether the worker had a covered disability. Now the EEOC, the courts, and employers must focus on the interactive process with a disabled worker, where the employer and employee discuss what reasonable accommodations will enable the employee to perform the essential job duties.

Not "Disabled," Not Protected

Some people may have disabilities, but are not covered under the ADA:

current users of drugs
food handlers with communicable diseases
gamblers, kleptomaniacs and pyromaniacs
pedophiles

Also not protected are people who pose a danger to others. For example, people with contagious diseases are not required to be employed if they will infect others.

Courts look at two factors in judging whether an employee poses a danger to others. First, how is the disease transmitted? In the case of AIDS, it is communicable only through the exchange of bodily fluids. In most workplaces, bodily fluids are not exchanged. The disease can't be transmitted to co-workers. Tuberculosis, on the other hand, is communicable through the air by repeated coughs or sneezes by an infected person. The likelihood of infecting co-workers is much greater.

The second issue is how long is the carrier infectious? In the case of tuberculosis, it's communicable for a relatively short period of time. It might be reasonable to give time off on medical leave. On the other hand, a person who is HIV positive always is infectious.

If there is a reasonable probability someone at work will become infected, you can refuse employment. If there is no such probability, but only fear based on misinformation, you can't discriminate.

The U.S. Supreme Court has held that while a schoolteacher with recurring tuberculosis was protected from discrimination because of her medical history, she could be removed from classroom duties if she was actively infectious. And in a 2000 federal appellate decision, a city that had refused to hire an HIV+ police candidate, based on an "unsubstantiated and cursory medical opinion" was forced to admit that the applicant posed no threat to co-workers, other law enforcement personnel, medical professionals, suspects and accident victims.

Who's Qualified?

In a variety of cases, employees who have physical or mental impairments that substantially limit one or more life activities, and therefore meet the ADA standard for "disabled" are not "qualified individuals with a disability" under the ADA because their disability makes them incapable of performing one or more of the essential functions of their jobs.

Look at Martinson v. Kenny Shoe Corp., for example. Mr. Martinson was a shoe salesman, who had to work alone and who suffered occasional epileptic seizures in the workplace. Testimony at trial revealed that but for Mr. Martinson's seizures, he was a reliable and capable salesman. However, over a six month period, he suffered sixteen seizures at work, each of which lasted five to ten minutes and required him to recuperate for twenty to forty-five minutes

afterwards. While the court found that Mr. Martinson had been discharged because of his epilepsy, it went on to explain that the discharge did not violate the ADA because he was not "qualified." He could not provide the essential function of store security. No accommodation could have enabled Mr. Martinson to provide uninterrupted security during his seizures.

For some jobs, the ability to work 40+ hours a week is an essential function, as established in a 2003 state supreme court decision. Thomas Davis was a systems engineer for Microsoft for nine years, regularly working 60 to 80 hours a week, as did everyone else in the department. When Davis contracted hepatitis C, his doctor told him to cut back to 40 hours, which Microsoft temporarily allowed him to do. Later, Microsoft told Davis that if he could not work the longer hours, he had to resign or find another job within the company, and gave him six months to find a position. But Microsoft refused to help Davis figure out which of the hundreds of open positions at the company could accommodate his 40-hour restriction. Davis applied for one job, but it required 60 to 90 hours. After the six months were up, he was terminated.

Davis sued Microsoft under the Washington Law Against Discrimination (which is substantially the same as the federal ADA) and won a jury verdict of $2.3 million. But the Washington Supreme Court threw out the verdict and held that, given the nature of the systems engineer job, overtime was an essential function, which Microsoft did not have to eliminate. The case was sent back for retrial on the issue of whether Microsoft had to duty to do more to help Davis find a 40-hour position. Other appellate courts have held that inability to work more than 8 hours a day is not a disability.

The employer gets to decide what are the essential job functions, and the courts will defer to that decision. The federal appeals courts have held that mandatory overtime can be an essential function, as can the ability to rotate through different jobs. Of course, if the company has a mandatory overtime or job rotation policy, it must be applied to all employees in that job, not just the worker with a disability.

No Stereotypes Allowed

The spirit of the ADA says don't make assumptions about what a person with a disability can or can't do. Instead, ASK.

Don't judge people until you know them. In interviews, you can ask people who are disabled only about their ability to do the job. If they say they can do the job, don't assume they can't. Take them at their word, test them or hire them on a temporary basis.

Job Descriptions are Essential

You must hire a person with a disability only if he or she can perform the essential functions of the job.

The "essential functions" are the tasks the employee who holds the position *must* be able to perform. If the position exists in order to perform the function (a typist, for example, is hired to type) then it is essential. If the task makes up a large portion of the job it is essential.

There are some functions that an employee never performs, but they are still essential. For example, firefighters must be able to carry adults out of burning buildings. They are the only people in our society hired to do this, so it's an essential function. Yet a firefighter may never actually have to do it.

Rewrite all job descriptions (or write job descriptions for the first time) so they indicate the essential functions of each job. Job descriptions written before advertising job openings will help you win discrimination claims. If you don't write job descriptions, the employee's performance appraisal may be presumed to show all the essential functions.

By writing accurate job descriptions and using them in the hiring process, you will protect yourself from a discrimination suit. You also will make a better hiring decision no matter who you pick.

Reasonable Accommodation Required

In the ADAAA, Congress made it clear that it wanted employers to focus on their obligation to reasonably accommodate disabled applicants and employees. A "reasonable accommodation" is a change you make in a job's requirements so a person with a disability can do it.

Reasonable accommodation is supposed to remove workplace barriers. Employers have no obligation to provide personal use items, that is, equipment that helps someone in daily activities on and off the job, like wheelchairs, eyeglasses, or prostheses.

There are three general categories of reasonable accommodations:

- changes to the application process, so a qualified applicant with a disability can be considered for a job;
- changes in procedures so an employee with a disability can enjoy equal benefits and privileges of employment; and

- changes in the work environment, so a qualified worker with a disability can perform the job.

The vast majority of the cases on reasonable accommodation fall into the last category.

Reasonable Accommodations in Hiring

- An employer can tell applicants what the hiring process involves (interview, timed test, job demonstration, etc.) and can ask applicants whether they will need a reasonable accommodation for that process.

- After an offer is made, the employer may ask about reasonable accommodations needed for the job, as long as all entering employees in that job category are asked the same question. Alternatively, if the applicant brings up the subject, the employer should begin the interactive process of determining what accommodations are available.

- An employer must provide a reasonable accommodation in the hiring process, even if it believes it cannot provide that same accommodation on the job. For example, a deaf applicant requests a sign language interpreter for an interview. If the employer refuses to consider the applicant because it assumes it would have to provide a full-time interpreter, it has violated the law. Unless providing an interpreter for the interview is an undue hardship, the employer must do so, and should inquire during the interview to what extent the applicant would need an interpreter to perform any essential job functions.

Reasonable Accommodation for Privileges of Employment

Employers must provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment." This includes employer-sponsored:

- training

- services (e.g. cafeteria, lounges, transportation, credit unions, gymnasia) and

- parties and other social functions, such as the annual outing.

Employers must ensure that employees with disabilities have access to information provided to other workers. So, for instance, if the employer customarily uses a public address system to remind employees of special

meetings and to make certain announcements, it must make the same information available to a deaf employee—through a memo, for example.

Changes in Work Environment

Since each disabled person and his/her medical condition is unique, so will be the reasonable accommodations necessary to enable that person to perform the job. However, as explained below, if the accommodation will cause the employer "undue hardship," then it does not have to be made.

Reasonable Accommodation

Seven ways you may be required to reasonably accommodate people with disabilities:

reassign to a vacant position
buy equipment
modify structures
restructure jobs
schedule part-time work
rewrite tests
provide readers and interpreters
grant extra leave time

This list is not exhaustive, but only illustrative of the lengths Congress expects employers to go in order to hire people with disabilities.

People in wheelchairs can be accommodated by building ramps over stairs. A person who is blind can be given an optical character reader to scan printed materials. An employee who is deaf can use networks and TTY telephones. Indeed, due to rapid advances in technology, many physical limitations can be overcome at work.

Jobs must be restructured so people with disabilities can perform them. But you don't have to restructure out the essential functions of the job. For example, let's say you have two shipping & receiving clerk positions in the warehouse. The jobs are identical. The clerks are required to open the doors when a shipment arrives, open and unpack boxes, check the items against the packing list and purchase order, inventory the items in the computer, and stock the shelves by driving a forklift and lifting up to 50 pounds to a height of 6 feet.

A person in a wheelchair might be able to do all of these functions except lifting over 4 feet. A reasonable accommodation would be to restructure these two jobs, so that an applicant in a wheelchair could do one of them.

Giving employees part-time work schedules also may be required to reasonably accommodate. But you also can pay them part-time wages. In contrast, if you hire a reader or interpreter for employees who are deaf or blind, that cost can't be deducted from their pay.

Reasonable accommodation of other disabilities takes different forms. A person with cancer may require chemotherapy, and a person with kidney disease must undergo dialysis. They are able to work most of the time. Reasonable accommodation might require they be given off one day a week for treatment.

When employees have AIDS, reasonable accommodation might require you to give them some leeway in taking their disability leaves in bits of time, rather than all at once. That's because people with AIDS can become ill frequently with colds, pneumonia, bronchitis and other infections. They might be at work for three weeks, then out for a week. They should be allowed to use their sick days and disability leave for those weeks as they come up.

At a minimum, employees with disabilities are allowed 12 weeks a year for leave, taken in any increment that is medically necessary: one hour a day, one day a week, or one week a month. See the section on the Family Medical Leave Act.

Although not required by law, some companies allow employees to bank their accrued sick leave and donate it to co-workers who need it.

If disabled employees don't accept accommodation, they are no longer protected by the law. For example, one company had an employee who was hard of hearing, but she refused to wear a hearing aid. As a result, she couldn't perform all of her job duties. She could be dismissed.

Recovering alcoholics and rehabilitating drug addicts also must be reasonably accommodated. If they need to attend a treatment program, the company must allow reasonable time off. But their addictions should not be accommodated. Current abusers aren't covered. If they can't do the job, don't show up for work or are frequently tardy, you can fire them the same as other non-performers.

In 2008, the EEOC issued official guidance on applying performance and conduct standards to employees with disabilities. Employers will find that this

guidance clarifies a lot of ADA issues in a way that is straight-forward and makes business sense.

Here is a sample of some of the questions and answers from the EEOC:

Q: If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?

A: Yes. Reasonable accommodation does not require that the employer tolerate poor performance or withhold disciplinary action, including termination. The employer does not have to cancel a PIP (performance improvement plan) because reasonable accommodation never requires excusing poor performance or its consequences.

Q: If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

A: Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, destruction of property, and insubordination. Employers may require that employees show respect for, and deal appropriately with, coworkers, clients and customers.

Q: What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?

A: The employer may still discipline the employee for the misconduct.

Q: Should an employer mention an employee's disability during a discussion about a performance or conduct problem if the employee does not do so?

A: Generally, no.

Q: When discussing performance or conduct problems with an employee who has a known disability, may an employer ask if the employee needs a reasonable accommodation?

A: Yes, but the employer is not required to ask - the duty to request is on the employee.

Q: May an employer require an employee who is having performance or conduct problems to provide medical information or undergo a medical examination?

A: Sometimes. The ADA permits but does not require an employer to seek medical information. An employer may choose to focus solely on the performance or conduct problems and take appropriate steps to address them.

How Is A Reasonable Accommodation Requested?

In general, it is the responsibility of the disabled individual to inform the employer that an accommodation is needed. After all, the ADA represents a step away from the old, paternalistic idea that society at large knew best what to do for the handicapped; the ADA is premised on the belief that people with disabilities know best what accommodations they need to be successful.

Employees cannot expect employers to read their minds and know they secretly want accommodation, and then sue for not providing it. As one court has noted: "The ADA does not require clairvoyance." But the ADA does not mandate that an employee follow a formal procedure or use "magic words," either. To be safest, an employer should consider as a request for accommodation any statement by an employee that a job modification is needed because of a medical condition that might be a disability.

If an employee has been out on extended leave, returns to work, and has difficulty meeting job standards, the employee may be disabled and need a reasonable accommodation. Before putting the employee on a performance plan, contact Human Resources. They may begin a discussion with the employee about the appropriateness of a reasonable accommodation.

However, if a disability prevents the individual from asking for accommodation ***and*** the employer knows about the disability and the need for accommodation, the employer cannot ignore what it knows. As one court put it: "The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." In 2008, a federal appeals court affirmed a jury award of $900,000-- plus nearly $650,000 in attorneys' fees and court costs--to a former pharmacy assistant with cerebral palsy whose impairment obviously affected his gait and speech, but who never had asked for a reasonable accommodation. In addition, the pharmacy manager was held personally liable for aiding and abetting disability discrimination under state law.

While most requests for accommodation will come from employees themselves, in appropriate circumstances--particularly if the impairment is

psychiatric--a family member such as an adult child, or a physician, may make the request for the employee.

Employer's Duty

Once an accommodation has been asked for, the employer has a duty to engage the employee in an "interactive process" to determine the appropriate accommodation under the circumstances. An accommodation is not automatically reasonable if the employer simply agrees to the employee's request, without an analysis of the worker's needs. In one appeals case, the employer agreed to a request for a modified work station because of a worker's carpal tunnel syndrome, but that accommodation was not effective and, therefore, not "reasonable".

Further, a worker has no right to compel the employer to provide a particular accommodation, if another, effective, reasonable accommodation is provided instead. The worker's choice of an accommodation does not necessarily control the decision. And, the duty of reasonable accommodation is a continuing one, not exhausted by just one effort. As the employee's medical condition changes, as job needs change, or if the employee transfers or is promoted, accommodations must be re-evaluated. If the accommodation is no longer effective, the interactive process starts again. One employer leaned this lesson to its chagrin in 2002 when it refused an additional accommodation to an employee whose multiple sclerosis had worsened and fired her. The employee won $2,300,000 in compensatory and punitive damages.

Undue Hardship

You are not required to reasonably accommodate any disability if it would be an undue hardship. According to one company's lawyer, "As far as the government is concerned, spending money is never an undue hardship!" Buying equipment is almost always considered reasonable.

An undue hardship causes significant difficulty or creates a significant expense for the company site (not just for you or your department). It would "fundamentally alter the nature of the business." You look at the net cost after tax credits.

When the ADA passed, Congress recognized that hiring people with disabilities could cost companies more. Congress explicitly made the decision to shift the cost of supporting people with disabilities from the taxpayers, who pay the cost of a non-working disabled population, to employers who will get the benefit of the work they perform.

Congress was asked to put a $10,000 limit on the amount an employer could be required to spend. This was defeated, so you could be required to spend more. However, according to a report from the Office of Vocational Rehabilitation, over half of the people with disabilities who were accommodated required NO extra costs, and another 30% required expenditure of less than $500.

The same report found 91% of the disabled workers had average or better productivity on the job than non-disabled employees. 75% had better safety records. And able-bodied workers' turnover rate was 11:1 compared to people with disabilities. Most important to the issue of reasonable accommodation, 55% of the people with disabilities had better attendance than able-bodied workers, and only 5% had worse records.

In 2002, the U.S. Supreme Court held that it would ordinarily be unreasonable to force an employer to modify its seniority system so that an employee with a disability could be reassigned. This ruling applies even where the seniority rules are a matter of company policy and not part of a collective bargaining agreement. The Court left open the possibility that in special circumstances, a particular employee might be able to prove that an accommodation that trumps seniority rules is reasonable.

Extended Leave Not Reasonable

If an employee with a disability needs more than the 12 weeks of leave provided by the FMLA, how much time off do you have to give before it's an undue hardship? It depends on the answers to these questions:

--is temporary help available?
--how essential are the job functions?
--how will work delays impact the company?
--how much time off is requested?
--is the employee otherwise satisfactory?

The courts agree that, generally, regular and reliable attendance is an essential function of a job. Requests for indefinite leave have been uniformly rejected as unreasonable, since the purpose of an accommodation under the ADA is to allow disabled people to work, rather than to hold a job for someone who can't work.

Other cases hold that employees who are unable to return to work after exhausting the one-year leave of absence provided for in company policy are simply not qualified.

In one case, the employee argued that her employer was required to accommodate her frequent absences by eliminating its leave restrictions, allowing her to take donated leave, granting her additional leave without pay, permitting her to take unscheduled leave as needed, letting her use compensatory time before she earned it, and having her make up absences before or after they occurred. The court refused, reasoning that allowing the plaintiff to work basically whenever she felt up to it was not a reasonable accommodation.

However, providing leave within the terms of the company policy is not an undue hardship. For example, in a 1998 case, two short leaves (2-4 weeks each) due to flare-ups of lupus were not unreasonable, particularly since the employer took six months to fill the employee's position after she was fired. In another case that year, a worker's request for a short extension of her one-month leave for depression was held reasonable. And, in a third, the employer violated the ADA by rejecting a senior employee's request for 16 weeks paid leave, because company policy provided for up to 39 weeks of paid leave for such employees.

Glossing over poor performance and giving a disabled employee a better rating than deserved may seem kind, but good intentions are not enough, and can sometimes backfire. That's what a federal agency learned in a 2004 appellate case. Major depression had caused an attorney's work to deteriorate, but her supervisor continued to give her a "fully successful" rating in her performance reviews. Eventually, the attorney asked for a transfer as a reasonable accommodation for her disability. The agency refused, so she sued and won. The appeals court held that her "fully successful" ratings proved she was qualified for the job, and the refusal to transfer was disability discrimination.

How About Telecommuting?

The courts have split on the question of whether employers must allow telecommuting as a reasonable accommodation. For instance, in one case, a computer programmer with multiple sclerosis was allowed to telecommute, even though the employer contended that it was an undue hardship. (The claimed hardship was substantially undercut by the fact that the employer had offered telecommuting to other employees.)

Several appellate courts have stated that, even though a particular person's job duties were inconsistent with working from a remote location, nevertheless telecommuting could be a reasonable accommodation for others in appropriate circumstances. Other courts have refused to require telecommuting, particularly if there was evidence that the employee's work

might suffer from lack of supervision, or that the employee functioned as part of a team.

In a 2003 policy statement, the EEOC said that the ADA does not require an employer to offer a telework program, but if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.

In addition, the ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home. For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.

Sensitivity and Acceptance

Once hired, employees who are disabled must be treated the same as non-disabled employees whenever you make decisions about pay increases, transfers, training, overtime, promotions and terminations.

Just as important, you should support them after they are on the job. That means including them in casual conversation, giving them visibility as a representative of your area and preparing them for promotion in the organization.

Don't allow yourself or others to blame employees' errors on their disabilities. Everyone makes mistakes. On the other hand, don't be overly solicitous of employees who are disabled. Don't make the assumption that people with disabilities need help unless they ask for it.

W Mitchell, a professional speaker who uses a wheelchair, tells of the time a well-meaning person tried to help him when he wasn't expecting it. He almost fell over the edge of the stairs. Mitchell advises always to ask people in wheelchairs if they want help before giving it. Otherwise, just act naturally.

The ADA was passed because Congress perceived the value of the millions of "differently abled" people among us. If you treat them fairly, they will make great contributions to your company.

ADA Recommendations for Employers

- Be aware of not only federal law, but your state law's requirements and your company's policies on reasonable accommodations. Your state may set a higher or different standard than the ADA.
- An employer's reliance on bona fide, job-specific standards—especially if they involve public safety—is a powerful defense to discrimination claims.
- The ADA protects individual people, not classes. Everyone is entitled to an individualized assessment of his/her limitations and abilities.
- Written job descriptions are important in defining essential job functions and, therefore, the standards someone has to meet to be a "qualified individual with a disability" with protection under the law. An employer does not have to change those essential job functions as a reasonable accommodation.
- Make sure the hiring process is welcoming for disabled applicants.

- Create systems for providing company information to employees with disabilities.

- Be flexible in considering requests for reasonable accommodation. There are many sources of help in identifying reasonable accommodations, including the EEOC (www.eeoc.gov), and the Job Accommodation Network (http://www.jan.wvu.edu/).

- As a person, you want to do as much as you can for an employee with a disability, but as a manager, you do not want to put the company at risk. If you grant leave "off the books," or make an "informal" accommodation, that could lead to liability under the ADA. Always consult with Human Resources.

State Law Provisions May Provide More Protection than the ADA.

While more than 40 states cover disability in employment issues just as the ADA does, at least six—California, Illinois, Maine, New Jersey, New York, and Washington—provide more rights for workers, since they do not require a worker's mental or physical impairment to substantially limit major life functions.

Pregnancy, Family, Medical Leave

Family and Medical Leave Act

The federal Family and Medical Leave Act of 1993 allows employees to take leaves of absence in certain situations. The law applies to all employers with 50 or more employees (including temporary and leased employees. However, temps are not entitled to leave unless the temporary agency also has 50 employees.)

Employees are eligible if they have worked at least 12 months (whether or not consecutive) for the employer. They also must have worked at least 1,250 hours during the immediately preceding 12-month period. In order to be eligible, the employee must be employed at a worksite within 75 miles of which the employer employs 50 or more employees. Thus, small remote field offices are not required to give leaves. However, many employers have chosen to include all employees in their FMLA policies in the interest of fairness.

Employees are entitled to take off up to 12 weeks a year for the following purposes:

- birth of a child of the employee (mother or father)
- the placement of a child with the employee for adoption or foster care
- for the serious health condition of the employee or the employee's parent, child or spouse
- "qualifying exigency" arising out of spouse, child or parent being called to active duty in support of contingency operation

In 2008 the FMLA got its first significant update since its enactment in 1993. There are now provides two additional leave entitlements under the FMLA: (1) military caregiver leave and (2) qualifying exigency leave. Military caregiver leave requires employers to provide up to 26 weeks of unpaid leave in a 12-month period to the spouse, son, daughter, parent or next of kin of a service member injured in the line of duty. Caregiver leave is available to families of Regular Army, Navy, Marine Corps, Air Force, and Coast Guard personnel, as well as National Guard and Reserves troops. During that single 12-month period, caregiver leave is combined with regular FMLA leave and the total cannot exceed 26 weeks. Caregiver leave, like traditional FMLA, can be taken on an intermittent or reduced schedule basis, as medically necessary.

The 2008 law also allows an employee who has a spouse, son, daughter, or parent in the National Guard or Reserves to take some or all of the regular 12 weeks of unpaid FMLA leave in 12 month period due to a "qualifying exigency"

resulting from the family member's active military duty (or call to active duty) in support of a federal contingency operation. This does not include State call-ups to active duty.

What's a qualifying exigency? The new rules define them as:

1. Short-notice deployment – to address any issues that arise due to the fact that service member received a week's notice or less of the deployment;

2. Military events and related activities – to attend any official ceremony, program, or event related to the service member's active duty; or to attend family support or assistance programs and informational briefings sponsored by the military;

3. Child care and school activities – to arrange for alternative childcare; to provide childcare on an urgent or immediate basis; to enroll or transfer a child to a new school; and to attend meetings with school staff that are made necessary by the service member's active duty or call to active duty;

4. Financial and legal arrangements – to make or update financial or legal arrangements; and to act as the service member's representative in obtaining, arranging or appealing military benefits;

5. Counseling – to attend counseling sessions related to the service member's deployment or active duty status;

6. Rest and recuperation – to spend up to five days with a service member who is on short-term R&R leave;

7. Post-deployment activities – to attend ceremonies and reintegration briefings for a period of ninety days following the termination of the service member's active duty status; and to address issues arising from the death of a service member; and

8. Any other activities that the employer and employee agree qualify as an exigency.

Employers can compute the 12-month period in a calendar year, fiscal year, rolling year, or other ways. The actual amount of time that is included in 12 weeks depends upon the amount of time the employee usually works. If the employee usually works a 40 hour week, 40 hours would be multiplied by 12 weeks to give the employee 480 hours per year. An employee who works 50 hour weeks would be entitled to 600 hours, and so on.

In the case of a serious health condition, the FMLA allows leaves to be taken in any increment that is medically necessary. Thus, if employees' doctors require them to take off an hour a day, a day a week, or a week a month, they can do so indefinitely, since a 40-hour a week employee could take off over 9 hours a week without using up FMLA time.

In the case of birth or adoption, the FMLA does NOT require employers to give intermittent leaves. Instead, you can insist the employee take the leave all at once. In California, the employee can elect to take the leave in up to 3 increments (e.g., 4 weeks off, 2 weeks back, three separate times within the year after the child is born.) Employers are allowed to grant intermittent leaves after birth or adoption, as long as they do so consistently. Also, keep in mind that an employee disabled due to pregnancy is entitled to intermittent leave for medical reasons.

Employers may temporarily transfer employees who are working a reduced schedule as long as the position is equivalent in terms of pay and benefits to the position being vacated.

FMLA leave is unpaid by law. An employer can deduct the pay of an employee, whether the employee is exempt or non-exempt, for all hours not worked as a result of leave.

Employees may elect, and employers may require employees, to take all accrued paid vacation, sick leave and personal leave during an FMLA leave.

Employees are not entitled to accrue any seniority or other employment benefits during the leave, unless the employer usually allows accrual of such benefits during other unpaid leaves. This includes non-health insurance, vacation, educational benefits and pensions. Health insurance under a group health plan must be continued for the employee during the leave, with the employer paying its usual share of premiums.

"Employees who are reinstated following a leave are not entitled to any right, benefit or position other than those to which they would have been entitled had they not taken the leave." FMLA section 104(a)(3). In other words, employees must be treated as if they had never left.

After employees are ready to return to work, the employer must reinstate them to the same or equivalent positions. An equivalent position must have the same pay, benefits, privileges, perquisites and status, involve substantially similar duties and responsibilities, and require equivalent skill, effort, responsibility and authority.

Reinstatement is not required if (1) the employee's position would have been terminated anyway (e.g. in a legitimate reduction in force) or (2) the employee is "key" and needed to be replaced to prevent "substantial and grievous economic injury" to the employer. The key employee exception only applies to salaried employees who are the highest paid 10% of all employees within a 75 mile radius.

While terminating employees who are out on FMLA leave is not automatically illegal, it is very risky. In 2002, an appellate court affirmed a verdict of more than $800,000 in favor of a laboratory technician who was fired while he was out on sick leave, recuperating from knee surgery. After a tornado ravished a nearby town, the technician, who was also a long-time Red Cross volunteer, was called several times and asked by the Red Cross to help at the scene. Not sure of what help he could be while on crutches, he finally agreed, and he drove a canteen truck and served refreshments while sitting in the truck. One of his bosses saw him on local TV, and fired him for what he termed "gross violation of company policy." The court found a gross violation of his FMLA rights instead!

Another 2002 FMLA case highlights the need for employers to consistently discipline employees for poor performance and to document that discipline. There, an employee had received generally good evaluations, but she had been told for more than three years that she needed to do a better job of training junior employees. The employee learned she had breast cancer, and went out on FMLA leave for approximately seven weeks. During her absence, her department floundered because, in her boss's opinion, she had not adequately trained anyone else to do parts of her job. She was fired five weeks into her leave, for failure to train the junior employees.

At trial, the employee showed that she had received just one reprimand for her training lapses, and was able to argue that she had never been seriously disciplined, that there had been no formal emphasis on the importance of training and that there had been no follow-up by management on her training efforts since the reprimand. The court held that "the jury could reasonably infer that, had [the employee] been healthy, [the employer] would have permitted her to continue indefinitely at her job without training anyone," and affirmed the award of more than $125,000 in damages.

By contrast, in a 2001 federal appellate decision, a nursing home activities director went out on FMLA leave, and a temporary replacement came in. During the director's leave, a discrepancy between her department's checkbook and the bank balances came to light, and the day she came back from leave, the director was fired for embezzlement She sued for violation of her FMLA rights, and lost. She would have been fired whenever the

embezzlement was discovered, after all. The court said that its role was not "to tell employers how to discipline employees; rather, it is to ensure that the process is not discriminatory. [T]he fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee."

What is a Serious Health Condition?

A serious health condition is defined to mean an illness, injury or condition that requires hospitalization, or continuing treatment by a health care provider for an illness that lasts MORE THAN 3 consecutive days. Specifically excluded are colds, flu, ear aches, upset stomachs, minor ulcers, headaches (other than migraines), routine dental, eye exams and routine physicals, unless they meet these requirements.

The employee must give notice of a request for leave at least 30 days in advance, or as soon as practicable in the case of medical emergencies.

FMLA leave depends on employer knowledge of a qualifying condition, and one federal appeals court has opined that unusual employee behavior might itself be "notice that something had gone medically wrong". That 2003 case involved an engineer who, after four years as a model employee, began sleeping on his shift, hallucinating, and acting oddly. He was fired for not attending a mandatory meeting and for sleeping on the job. Relatives then took him to the hospital after talking him out of a room in which he had barricaded himself, and he was diagnosed with severe depression. When the employer would not take him back after his release from the hospital, he sued, and the appeals court said he was entitled to try to persuade a jury that either his changed behavior was enough to tell a reasonable employer that he was suffering from a serious health condition, or that he was mentally unable either to work or to give FMLA notice. If so, said the court, "instead of treating [the engineer]'s final two weeks as goldbricking, [the employer] should have classified this period as medical leave".

Employees are required to provide medical certification of the need for the leave. Employees can be required to provide recertifications every 30 days, or more often in certain situations.

If the employer doubts the need for a medical leave, the FMLA allows the employer to send the employee to another doctor, at the employer's expense, for a second opinion. If that doctor disagrees with the employee's physician, the employee goes to a third doctor, whose decision is final and binding.

There is one requirement you can put on the employee: to make a reasonable effort to schedule medical treatment to avoid undue disruption to the employer's operations.

Unlike the ADA, the FMLA does not have an undue hardship exception. Even if it would create an undue hardship on your organization to give a leave or allow reinstatement, you are required by law to do so.

Family and medical leave has become an essential part of business for both employees and employers. A 2000 survey by the U.S. Department of Labor found that nearly 60% of all U.S. workers are employed at FMLA-covered establishments.

In 2000, nearly 24 million workers—16.5% of all employees—took FMLA leave. The most frequent reason was for the employee's own illness (52.4%), followed by care for a newborn, newly adopted, or newly-placed foster child (18.5%), care for an ill parent (13%), and care for a sick child (11.5%). Among employees with children 18 months or younger, 3/4 of the women and close to 1/2 of the men took some FMLA leave.

Overall, even employees who did not take leave had very favorable views of the FMLA. More than 2/3 felt that co-workers taking leave had no impact on them, and another 17% felt a positive impact. Employers, too, were positive about the FMLA, with 64% reporting that compliance was "very" or "somewhat" easy, and more than 80% stating that FMLA compliance had either a positive impact or no noticeable effect on productivity, profitability, or growth.

Pregnancy Discrimination Act

The federal Pregnancy Discrimination Act gives pregnant applicants and employees more rights than they had in 1978, when it was passed, but significantly fewer rights than employees protected by the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA).

During the first year of employment, employees are not entitled to Family Medical leave. Nor does the ADA apply to temporary disabilities. So when the law says that pregnant applicants and employees "shall be treated the same as other persons ... similar in their ability or inability to work," one group of workers they can be compared to is first-year employees with short-term disabilities.

Thus, in a 1996 federal Court of Appeals case, the employer had a policy of terminating employees who needed leaves of absence for any reason, including medical, during the first year of employment. This was held not to be illegal pregnancy discrimination.

Similarly, in a 1995 case, an applicant was hired in a job that required a minimum of 6 months training. The employer said her absence due to pregnancy would require a period of re-training they could not afford. In upholding her termination, the court quoted the U. S. Supreme Court, saying, "'[T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.' There is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."

Under these cases, if there is a short-term critical deadline for a position, you may say to every applicant, "This job has a critical deadline in four months -- do you have a problem with that?" If the answer is yes, it's best if you interrupt them before they get to the reason, explain they do not meet the minimum requirements of the job, and terminate the interview. Better still, put this requirement in the job posting, requisition and advertisement.

Once employed, during the first year of employment pregnant employees must be treated consistently with everyone else. In one case, the employer had documented fifteen infractions by a pregnant employee for tardiness, lying, unfinished tasks, quota shortfalls, and lost business. She was fired and sued, but could not show that other, non-pregnant employees, were treated more favorably. Therefore the court held it was not pregnancy discrimination.

The key to winning was that the employer was consistent and had documented the problems. Most companies would not give any employees fifteen chances before terminating them. But by giving the pregnant employee every opportunity to improve, the employer documented its own good faith.

When an employee goes out on pregnancy leave, it is not unusual for hidden performance problems to be discovered. In a 1996 case, a manager went out on pregnancy leave and severe performance problems were discovered by her temporary replacement. The trial court held the employer could terminate her employment as it would the employment of other employees with similar work problems; this was upheld on appeal.

Even women who are not pregnant at the time, but have been or might become pregnant, are covered by the Pregnancy Discrimination Act. In a 2000 case, a woman casually mentioned to her supervisors at a company party that she and her husband were thinking of starting a family. She was later fired, and claimed it was in violation of the PDA, while the employer said it was for poor performance. The court held that while she was never actually pregnant, intending to become pregnant was a protected characteristic. And, in a 2003 federal appellate case, a woman was awarded more than $600,000 in

damages after her female supervisor nitpicked her about medical appointments during her pregnancy, harassed her about time off to care for the sickly baby, and told her, "you better not be pregnant again" when the employee returned from an emergency room visit after fainting at work due to stress.

In a 2008 case, a federal appeals court held that a woman who was fired when she took time off for in vitro fertilization could bring a PDA claim. The employer argued that infertility is gender neutral, affecting both men and women, and the trial court agreed, dismissing the case. But the appeals court reversed, holding that the capacity to become pregnant was a condition related to pregnancy, and thus covered by the PDA. The circuit court further noted that employees discharged for taking time off to undergo in vitro fertilization - just like employees taking time off to give birth or receive other pregnancy-related care - "will always be women."

And in another 2008 decision, a different federal appeals court held that a woman who had been fired because she had undergone an abortion also had a PDA claim. In that case, the woman's doctor had advised her that her fetus had severe deformities, and recommended that she terminate the pregnancy. She took three days off, and on the third day—the day of the funeral—she was fired for allegedly not following the company's daily call-in procedure. The court found that daily call-in rule was not enforced with other employees and that a co-worker reported that the supervisor who fired the woman said that the pregnant woman "didn't want to take responsibility," a reference to her abortion.

California Leave Laws

So far we've discussed federal cases. Pregnant employees in California are entitled to more rights than their sisters in other states. If a woman is disabled by pregnancy or childbirth, she is entitled to up to four months disability leave, even during her first year of employment. Thus she could not be fired for "excessive absenteeism" due to pregnancy or childbirth until she had been out for longer than 4 months. However, performance problems or absenteeism due to illnesses unrelated to the pregnancy are grounds for legitimate adverse actions.

If the pregnant employee has been employed for more than a year, and becomes disabled as a result of childbirth, she could have 4 months plus 12 additional weeks of time off under FMLA, with reinstatement guaranteed.

As with the FMLA, the disability must be certified by a doctor. There is no undue hardship exception to allow you to deny a leave or reinstatement.

California has two laws allowing parents time off for their children's school activities. Labor Code section 230.8 allows parents to take off up to 40 hours per year for the children's activities at school or daycare. This could include volunteering to work in the classroom, supervising a field trip, watching a school play or game.

The employer can limit this to 8 hours a month. This time can be taken in any increment -- by the hour, half day or full day.

Parents whose children are suspended from school and who are called to meet with school officials, may take off an unlimited amount of time for such meetings.

Other State Leave Laws

Many other states have laws allowing workers to take time off from work to care for sick family members, attend school functions, or take a family member to medical appointments. These laws may cover smaller employers and different circumstances than the FMLA.

New Jersey, for instance, allows 12 weeks of leave every 24 months that also covers absences to care for step-parents, step-children, and parents-in-law.

The Massachusetts Small Necessities Act gives workers 24 hours per year to attend children's school activities or to take children or elderly relatives to routine medical or dental visits. Louisiana, New York, and South Carolina provide extra leave to bone marrow donors.

Several states recognize and protect a nursing mother's right to breast-feed and/or express milk in the workplace. California, Florida, Georgia, Hawaii, Minnesota, Oregon, Tennessee, and Texas statutes encourage or require employers to provide reasonable unpaid break time to an employee who needs to express milk, and to provide a place (other than a toilet stall) for them to do so.

Hawaii also guarantees a nursing mother's right to breast-feed at work. And Florida and Texas companies that support work-site breast-feeding can use the designations "mother-friendly" or "baby-friendly" in their recruiting and promotional materials.