Employer-Employee Relations

John D. Copeland
Director
National Center for Agricultural Law
Research and Information

Robert A. Leflar Law Center
University of Arkansas
Fayetteville, AR 72701
(501) 575-7646

Table of Contents

Prepared by John D. Copeland:*

*Director of the National Center for Agricultural Law Research and Information (NCALRI) and Associate Research Professor of Law, University of Arkansas School of Law; B.A., University of Texas at Arlington; J.D., Southern Methodist University; LL.M., University of Arkansas. This material is based upon work supported by the USDA, National Agricultural Library under Agreement #59-32U4-8-13. Any opinions, findings, conclusions or recommendations expressed in the publication are those of the author and do not necessarily reflect the views of the USDA or the NCALRI. The outline's information is to be used as an education tool. The outline is not a substitute for the advice of legal counsel.

EMPLOYER-EMPLOYEE RELATIONS

by
John D. Copeland, Director
National Center for Agricultural Law Research and Information

It is good business for an agricultural employer to treat his or her employees properly. Employees who are treated respectfully, adequately compensated and provided with safe working conditions are more productive. Just as importantly, it makes good legal sense for an agricultural employer to safeguard the rights of his or her employees. A number of federal and state statutes protect employees' rights, along with common law tort doctrines which have evolved over the years. While it is impossible to cover in a brief outline all of the legal actions available to aggrieved employees, agricultural employers need to be aware of the following statutes and legal doctrines.

I. Statutory Protection of Civil Rights

Since the early 1960s a substantial amount of federal legislation has been passed to guarantee employees their civil rights. Much of the following federal legislation also has state counterparts modelled after the federal provisions.

A. Title VII

Congress has passed extensive legislation to prohibit discriminatory employment practices. Title VII of the Civil Rights Act of 1964 has been especially important in protecting the civil rights of employees and job seekers. Title VII removes all "artificial, arbitrary and unnecessary" barriers to employment based on sex, race, color, national origin, or religion. 42 U.S.C. §§ 2000e-2000e-17 as amended 1974; under Civil Rights Act of 1991 (VII covers all employers with 15 or more employees). The courts address Title VII cases under two theories: "disparate impact" and "disparate treatment."

1. Disparate Impact

A disparate impact case is one in which an employer uses practices that appear neutral on the surface, but adversely affect a protected class of persons such as women or minorities. An employer's imposition of minimum height and weight requirements upon prospective employees is a classic example of disparate impact. Even though the requirements apply to both men and women, they tend to exclude a larger percentage of women from doing a job because, on an average, men are taller and heavier than women. An employer's requirement that all employees weigh a minimum of 120 pounds and be at least 5 feet 2 inches tall effectively excludes over 40% of the female population, but less than 10% of the male population, and statistically establishes a *prima facie* case of sexual discrimination. John D. Copeland, *Sex Discrimination: Base Hiring Decisions on Applicant's Qualifications, Not Their Gender*, 36 NATIONAL HOG FARMER 14 (August 15, 1991).

If an employer imposes job requirements that have a disparate impact, the employer must prove that a business necessity justifies the hiring criteria. For example, if an employer did impose weight and height requirements for prospective employees, he or she would have to prove that the requirements were necessary to do the job. While physical size and strength can be a legitimate criteria if a job requires extensive heavy lifting or involves extremely strenuous physical work, an employer cannot merely assume that women cannot do the job. The United States Supreme Court requires the use of tests that measure strength directly. *Id.* at 15. If an employer needs an employee to do a physically demanding job, such as loading and unloading large livestock, the employer can require applicants to be able to repeatedly lift certain heavy loads. While the employer might be able to find more men than women capable of lifting the loads, the employer could not legitimately refuse to hire a woman who was physically capable of doing the job. *Id.* at 16.

An employer's claim that his or her discriminatory hiring criteria arise from a business necessity will be closely scrutinized by the courts. As the Supreme Court has noted, when a particular employment practice is shown to have discriminatory effects, it may be justified only if the employer shows it "... to have a demonstrable relationship to successful performance of the job for which it [is used]." *Id.* at 431. Therefore, in order for discriminatory criteria to qualify as a business necessity, the employer must show that:

(1) the criteria are necessary to the safe and efficient operation of the [employer's] business;
(2) they effectively carry out the purpose they are supposed to serve; and
(3) there are no alternative policies or practices which would better or equally well serve the same purpose with less discriminatory impact

CCH EMPLOYMENT PRACTICES,EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PRE-EMPLOYMENT INQUIRIES, para. 4120 (1981).

2. Disparate Treatment

Disparate treatment cases are obvious acts of discrimination. In disparate treatment cases an employer openly excludes classes of people from employment, such as women or minorities. In disparate treatment cases the complaining parties need only prove that they were qualified for a particular position, applied for it, and were rejected, even though the job continued to be advertised or was still available. *Id.*

Disparate treatment cases are extremely difficult for employers to defend. In order to successfully defend a disparate treatment case an employer must rely on the "bona fide occupational qualification" (BFOQ) exception found in Title VII. The BFOQ exception permits what otherwise would be illegal discriminatory practices "for religion, sex or national origin, as a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The BFOQ exception is extremely narrow and has not been recognized as a legitimate defense in a number of circumstances.

For example, customer preferences are not a legitimate BFOQ. The fact that an employer's customers do not like dealing with a woman, or a minority, or a person with a particular religious preference, is not a legitimate basis for discrimination. *Id.*

It is very difficult for an employer to refuse to hire any person based on a BFOQ exception. For example, an agricultural employer might believe that certain agricultural activities, such as handling heavy machinery or large animals, are particularly dangerous to women—especially pregnant women. However, the courts have not recognized a BFOQ exception on the basis that a job is dangerous to women. Instead the employer would have to prove that female workers would pose a threat to the safety of others—a highly doubtful proposition. *Id.* This is especially true given the 1978 passage of the Pregnancy Discrimination Act which states that discrimination "on the basis of sex" includes discrimination on the basis of pregnancy, child birth or related medical conditions. Women cannot be excluded from dangerous occupations because of possible injuries to unborn children. Under Title VII the woman makes those choices for herself and her unborn child. *Id.*

3. Pre-employment Practices

Title VII applies to discriminatory employment practices affecting every aspect of employment, including recruitment, hiring, promotion, compensation and termination of employment. Employers, however, are particularly vulnerable to Title VII claims arising out of preemployment practices. Many employers unknowingly conduct illegal interviews of prospective employees as many of the inquiries contained in employment application forms are unlawful. Some pre-employment inquiries are directly prohibited by law. For example, questions regarding prior arrest records have been found per se unlawful because the questions themselves have been found to disproportionately deter minorities. *Gregory v. Litton Systems, Inc.*, 316 F.Supp. 401 (C.D. Cal. 1970), aff'd 472 F.2d 631 (9th Cir.1972).

Employers are expressly prohibited from disqualifying applicants on the basis of their answers to discriminatory questions. Questions which either directly or indirectly disclose the race, color, religion, sex, or national origin of applicants may constitute evidence of unlawful discrimination. CCH EMPLOYMENT PRACTICES,EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PRE-EMPLOYMENT INQUIRIES, para. 4120 (1981). Therefore, employers must be extremely cautious in asking a pre-employment question that (1) identifies the applicant's race, color, religion, sex, or national origin, (2) results in the screening out of persons based upon these characteristics, or (3) which has no direct relationship to the employee's ability to perform the job as expected. *Id.*

Liability may arise not only from inquiries which directly seek information relating to the above characteristics, but also questions which indirectly screen out members of protected groups. *Id.* The clearest example of this is illustrated through impermissible lines of inquiry directed toward women.

Out of a desire to reduce the potential for employee absenteeism, many employers are typically concerned about a woman's child-bearing plans and child care needs. Questions relating to these subjects, even if asked of all applicants, indicate that the employer's hiring practices discriminate against women. The discriminatory effect arises from the fact that such questions have a disparate impact upon female applicants. Inquiries which even indirectly express a bias against women are unlawful, 29 C.F.R. § 1604.7, and will give rise to a cause of action against the employer.

The only means available to an employer for soliciting information which tends to indicate a discriminatory approach to hiring practices is if the employer can demonstrate that such an inquiry is justified by a business necessity. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

The employer bears a very heavy burden in establishing a business necessity for discriminatory pre-employment inquiries. Employers are generally required to support an assertion that a person's gender, race, religion, etc. are related to job performance with a technical validation study. EEOC GUIDELINES ON EMPLOYMENT SELECTION PROCEDURES, 29 C.F.R. § 1607 (1978).

Given the high risks posed to an employer who conducts discriminatory hiring practices, the agricultural employer should keep in mind the following considerations:

(1) all application and interview procedures should be conducted in accordance with formal, structured, standardized, objective, and job-related guidelines for evaluating the applicant's qualifications;
(2) current employees who will be involved in the applicant screening and hiring process must be instructed about the use of non-discriminatory lines of inquiry; and
(3) if there is a valid reason for gathering protected personal information from applicants, such as for purposes of health insurance policy coverage, the employer should wait until after making a decision to hire the applicant.

B. Americans With Disabilities Act (ADA)

One of the most important pieces of civil rights legislation to be enacted in recent years is the Americans With Disabilities Act (ADA), which was signed by President Bush on July 26, 1990. 42 U.S.C. § 12101 et seq. (1990). The ADA requires employers to make a "reasonable accommodation" to an applicant's or employee's known physical or mental limitations. Employers must modify work environments to make existing facilities readily accessible and usable by disabled employees. The ADA prohibits discrimination against disabled people in the same manner that Title VII prohibits discrimination against other protected groups. Christie Schluter, *Opening Opportunities, A Personal Perspective of ADA,* 55 Texas Bar J. 827 (September 1992).

1. Persons Protected

The ADA protects the 43,000,000 Americans with one or more disabilities. *Id.*, § 12101(a) Under the ADA disability means:

1. a physical or mental impairment that substantially limits one or more of an individual's major life activities;
2. a record of such impairment; or
3. being regarded as having such an impairment. *Id.*, § 12102(2).

The ADA protects not only those with obvious mobility impairments, but also the mentally retarded and those with such hidden disabilities as epilepsy, cancer, heart disease or AIDS. Even those persons with mental disturbances may be protected.

2. Private Employment Discrimination

Private employment discrimination is prohibited under Title I of the ADA. Title I states the following policy goal:

> "(a) General rule - No covered entity shall discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement of or discharge... ." *Id.*, § 12112(a).

Covered entity includes any employer with 25 or more employees. After July 26, 1994, an employer will

> "mean any person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year... ." *Id.*, § 12111(5)(A).

3. Qualified Person With a Disability

A qualified person with a disability is defined as:

> "An individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position... ." *Id.*, § 12111(8).

To avoid discriminating against a "qualified person with a disability" an employer must be careful to define the "essential functions" of a position. An employer must be able to explain why any function is listed as essential. It is suggested that an employer itemize and prioritize all duties of a particular position and write the job description in clear,

concise and accurate language. David L. Ryan, *Americans With Disabilities: The Legal Revolution*, KANSAS BAR JOURNAL 13, 15 (Nov. 1991).

The federal regulations describe "essential function" as:

> "Primary job duties that are intrinsic to the employment position the individual holds or desires. The term 'essential function' does not include the marginal or peripheral functions of the position that are incident to the performance of primary job functions." 29 CFR 1630. 2(n).

Factors which can be considered in determining whether a job function is essential include:

- employer judgment;
- time necessary to perform a function;
- work experience of current and past employees in that position;
- limited number of employees available to perform the function;
- consequences of not requiring a certain function;
- the position exists to perform the function.

The above factors are just some that can be taken into consideration. Each case is decided on its own merits. Ryan, *supra*, at 15.

Once the employer has defined the essential functions of a job, the employer must design hiring and advancement procedures which are non-discriminatory towards the disabled. Ryan, *supra*, at 16.

4. Pre-employment Inquiries

The ADA prohibits any pre-employment inquiries about disability. Instead, the employer must first make a job offer which is conditional upon the satisfactory results of a post-offer medical examination. The medical examination is conducted before the applicant starts work and the employer may also at that time ask health-related questions. However, all applicants who receive a job offer in the same job category must be subjected to the same examination and questions. *Id.* at 815.

Although the ADA limits some inquiries, the following information can still be obtained during an interview:

- the applicant's educational background;
- the applicant's previous work history;
- the applicant's qualifications for the position;
- the applicant's abilities to perform the essential functions of the position with or without reasonable accommodation;
- what the company has to offer as an employer; and
- the applicant's interest in the company. *Id.*

However, questions routinely asked on employment applications, and previously not violative of other civil rights legislation, may be prohibited under the ADA. Examples of such questions include the following:

- Have you ever had or been treated for any of the following conditions or diseases (followed by a checklist of various conditions and diseases)?
- Have you been treated for any conditions or diseases in the past three years? Please list.
- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
- Have you ever been treated for any mental condition?
- Is there any health-related reason you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last five years?
- How many days were you absent from work because of illness last year? (Note: an employer may state its attendance requirement and inquire whether the applicant can satisfy that requirement).
- Do you have any physical defects that preclude you from performing certain kinds of work? If so, please describe the defects and specific work limitations.
- Do you have any disabilities or impairments that may affect your performance in the position you seek?
- Are you taking any prescribed drugs? (This inquiry is prohibited because the answer may reveal a disability).
- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed for workers' compensation insurance? Elizabeth Ann Hall & Michelle Hoogendain Cash, *ADA Concerns, the Hiring Process*, 55 Texas Bar J. 814, 815 (September 1992).

5. Reasonable Accommodation

To establish a *prima facie* case of discrimination, a "qualified person with a disability" need only show that he or she was discriminated against and that a reasonable accommodation could have been made by the employer to accommodate the complainant's disability. "Reasonable accommodation" includes: (1) making existing facilities readily

accessible and usable to disabled persons; (2) restructuring jobs, such as modifying work schedules; (3) modification of equipment or devices or even the acquisition of new equipment or devices; (4) modification of examinations, training materials or policies; (5) hiring qualified readers or interpreters, and (6) similar modifications for disabilities. 42 U.S.C. § 12111(9)(A)&(B).

6. Undue Hardship

To defend a *prima facie* case of discrimination under ADA, the employer must prove that a reasonable accommodation would be an "undue hardship." *Id.* , § (10)(A)&(B). Undue hardship is determined on a case by case basis, but the following factors may be taken into consideration:

- the facility's financial resources;
- number of persons employed;
- the overall size of the operation;
- the impact of the expense on the business;
- the type of business, its structure and functions.

Id., § 12111(10)(A)&(B).

7. Prohibitions and Exemptions

Although the protection afforded under the ADA is extremely broad, there are a number of persons and activities that are not covered. The following is a list of those persons and activities:

- The ADA specifically excludes from protection homosexuals, bisexuals, compulsive gamblers, kleptomaniacs, transvestites, transsexuals and pediphiles. *Id.*, § 12211(a)&(b)(1)-(3).

- A person who is a "significant risk to the safety of others" may be denied a job without reasonable accommodation. *Id.*, § 12111(3).

- An employer may prohibit the illegal use of drugs and alcohol at the work place. Also, employers can require that employees not be under the influence of alcohol or illegal drugs while at work. *Id.*, § 12114(c).

8. Enforcement

Like Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963, the ADA is enforced by the Equal Employment Opportunity Commission (EEOC). As a result, employees have a convenient mechanism for pursuing grievances against employers. Many states have their

own anti-discrimination statutes and enforcement agencies which function in a manner similar to the EEOC.

C. Other Acts

Besides Title VII of the Civil Rights Act of 1964 and the ADA, employees are protected by a number of other pieces of federal legislation. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employers from discriminating against employees, or prospective employees, on the basis of age. 29 U.S.C. §§ 621-634Z (1967 & Supp. 1982); *see also* GORDON E. JACKSON & STEPHEN L. SHIELDS, HOW TO DEFEND AND WIN LABOR AND EMPLOYMENT LAW CASES 309 (1992). Sex-based compensations differentials for work requiring equal skill, effort and responsibility are prohibited by the Equal Pay Act of 1963, 29 U.S.C. § 206 (1938 & Supp. 1977)(which is discussed in greater detail elsewhere in this outline); *see also* Jackson & Shields, *supra*, at 309.

II. Occupational Safety and Health Act

A. Overview

The Occupational Safety and Health Act of 1970 (OSHA) 29 U.S.C. § 651 *et seq.* (1970 & Supp. 1992) assures safe and healthful working conditions for employees. OSHA applies to private employers engaged in business affecting commerce. The broad judicial interpretation of commerce subjects virtually every employer to OSHA requirements. OSHA requires employers to provide places of employment free of recognized hazards causing, or are likely to cause, death or serious physical harm to employees. Jackson & Shields, *supra*, at 440.

The United States Department of Labor constantly promulgates safety and health standards with which employers must comply. OSHA defines "occupational safety and health standards" as: "[a] standard which requires condition, or the adoption or use of one or more practices, means, methods, operations or processes reasonably necessary or appropriate to provide safe or healthful employment or places of employment." *Id.* at 440.

Some key aspects of OSHA already applicable to employers in general, include informing employees of safety regulations, adequate supervision of employee's activities, exercising due care in hiring co-workers, supply and maintenance of necessary equipment and warning employees of hazards inherent in the work place. John Copeland, *Employer Liability*, 36 NATIONAL HOG FARMER 31, 32 (Blueprint Series for Top Managers) (Fall, 1991).

OSHA does not give an employee a private cause of action against an employer for violations. Enforcement is the responsibility of the Department of Labor. OSHA violations, however, can be used as evidence in an independent tort action filed by an employee for on-the-job injuries suffered as a result of the negligent or intentional conduct

of an employer. *Id.* at 33.

OSHA regulators have become much more aggressive in recent years in citing employers for violations, especially where employees have been exposed to health hazards. Millions of dollars in fines have been assessed against employers for such actions as having excessive carbon dioxide levels in buildings, failing to provide employees with respiratory protection and failing to provide workers with written procedures to follow in case of chemical leaks. *Id.* at 32. Criminal actions have also been brought against employers when OSHA violations have resulted in employee deaths. In one case, a company's executives were successfully prosecuted for murder because of the deaths of employees recklessly exposed to toxic chemicals. *Illinois v. Film Recovery Systems, Inc.*, Nos. 84 C 5064 & 83 C 11091 (Cir. Ct. of Cook County, Ill. June 14, 1985). *See* discussion of Film Recovery Systems case in *Beauchamp v. Dow Chem. Co.*, 427 Mich 1, 23-25, 398 N.W.2d 882, 892-93 (1986).

B. Occupational Diseases

Traditionally, employers have had to concern themselves with traumatic injuries to employees, such as fractures, lacerations and amputations caused by accidents with machines. Gastel, OCCUPATIONAL DISEASE: INSURANCE ISSUES, 1990 Ins. Info. Inst. (Oct. 1990). The safety measures adopted by employers, as well as the insurance protection obtained on behalf of employees, such as workers' compensation, were all directed towards such injuries. However, employers must also now deal with, and prepare for, the ever growing list of occupational diseases. OSHA is now targeting occupational diseases.

1. Occupational Diseases Defined

Occupational illness is not a new phenomenon. The link between substances in the work place environment and illness was first established two centuries ago. At that time it was discovered that a link existed between cancer of the scrotum in chimney sweeps and creosote, a combustion by-product found in chimneys. Since then additional links, such as that between coal mining and black lung disease, have been found. *Id.*

An occupational disease is defined as any disability arising out of exposure to hazardous or harmful conditions of employment, provided the disease is peculiar to the employment. In other words, there is a greater incidence of the disease occurring in workers in a particular employment, as compared to other occupations, or in everyday life separate from employment. Some states now specifically define occupational disease in workers' compensation statutes and the following is typical of such definitions:

> "Every employee, who is injured or who contracts an occupational disease, and the dependents of each employee who is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury has occurred or occupational disease has been contracted, provided the same were not purposely

self-inflicted, is entitled to receive [compensation]." Ohio Rev. Code Ann. § 4123-54.

Definitions:

(2) "Accident, "injury," or "injuries" includes liability or death resulting from accident or occupational disease as defined in §§ (3) of this Section;

(3) "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, which can be fairly traced to the employment as an approximate cause and which has not come from a hazard to which the worker would have been equally exposed outside of the employment." Colo. Rev. Stat. § 8-41-108 (1973).

Occupational illnesses and diseases were initially not covered under Workers' Compensation Acts because of the notion that illnesses and diseases could not be considered to be unexpected (e.g., accidental), since they were recognized and accepted as an inherent hazard of continuing exposure to conditions of the particular employment. This idea, of course, has now been soundly rejected. Nothstein, *Workers' Compensation and the Exclusivity Doctrine*, in TOXIC TORTS, LITIGATION OF HAZARDOUS SUBSTANCE CASES, 147, 148 (G.Z. Nothstein, ed. 1989). Courts and legislatures also had the notion that occupational disease should be treated differently from occupational injury because hypersusceptible employees should be beyond the coverage of Workers' Compensation statutes. Obviously, this idea is now in revision, as most cases now hold that an individual weakness is immaterial, so long as the particular condition of employment in fact caused the disability beyond that normally prevailing. *Id.* In addition, even a disease which is normally non-occupational can become occupational if the work facilitates or aggravates its transmission. *Id.*

Many courts have defined disease in its broadest dictionary meaning of any "serious derangement of health" or "disordered state of any organism or organ." As a result, courts have defined at one time or another all of the following as diseases: "back strain, herniated disk, flat feet, deterioration of a toe joint, bursitis, rheumatoid arthritis, sciatic neuritis, gradual paralysis of arm and diaphragm from aggravation of thoracic outlet syndrome, tenosynovitis, varicosity, phlebitis, bronchitis, pneumonia, effeminacy and impotency, psychosis, stroke, and enlarged heart have all been held compensable as occupational diseases, with producer aggravated by the distinctive conditions or exertions of the employment." A. Larson, THE LAW OF WORKMENS' COMPENSATION § 41.42, at 7.408 through 418, see cases cited therein (1989 Edition).

The legislatures have also greatly expanded the concept of occupational disease and have thus made it increasingly easy for workers to file such claims. All 50 states now have

general occupational disease coverage. Many state statutes specifically list diseases that are considered to be occupational. It is a list that constantly grows. *Id.* § 41.10 at 7-353.

"An ailment does not become an occupational disease simply because it is contracted on the employer's premises. Instead, it must be one which is commonly regarded as natural to, inherent in, and incident and concomitant of, the work in question. There must be established a link between the disease and some distinctive feature of the claimant's job, common to all jobs of that sort." *Id.* § 41.32, at 7-372.

As far as agriculture is concerned, a number of ailments are now recognized as being natural to the industry. The following are a few of the more common problem areas:

a. Unusual Chemicals, Dust, Poisons or Germs

If a worker's employment is attended with unusual germs, poisons, chemicals, fumes, dust, spores, or similar conditions, the courts have had a little difficulty in deciding that any ailment arising out of such activity is peculiar to the employment and is not one of the ordinary diseases of life. *Id.* § 41.33 (a), at 7-373-375. All that need be shown is a natural link between the employment conditions and the injury in fact. For example, in *The Great Atlantic Pacific Tea Co. v. Robertson*, 218 Va. 1064, 243 S.E. 2d 234 (1978), an employee was found to suffer meat wrapper's asthma, which is a bronchial reaction or pulmonary insufficiency resulting from exposure to fumes when a "hot" wire cuts the plastic wrapper used by butchers to package cuts of meat. The workers compensation commission found a direct link between the employee's condition and his work. The disease was labeled as occupational and found to be compensable. 243 S.E. 2d at 234.

b. Familiar Elements Present to an Unusual Degree

In order for an employee to recover under an occupational disease claim, it is not necessary that the employee be exposed to unusual chemicals, fumes or the like. In some instances, the disease may be compensable even though the elements to which the employee has been exposed are common. The liability arises out of the fact that the employee has been exposed to these common elements to an unusual degree. Although exposure to change in temperature is common to all life and employment, exposure to excessive changes in temperature have been found to be compensable. Larson, *supra*, § 41.33 (b). For example, a butcher's pulmonary emphysema has been recognized as an occupational disease, although the disease itself is common to mankind, because of the causal relationship to the employment hazard of breathing refrigerated air. *Roettinger v. Great American Pacific & Tea Co.*, 17 A. D. 2d 76, 230 N.Y.S. 2d 903 (1962). In one case a butcher first developed an acute infection, known as lobar pneumonia, as a result of working in refrigerated conditions. Following treatment he attempted to return to work, but developed chronic pulmonary disease. The worker successfully pursued a worker's compensation occupational disease claim on the basis that the acute infection became chronic and that cold repeated exposure to refrigerated air had caused the occupational

disease. *Zivitz v. Zivitz Brothers, Inc.,* 414 N.Y.S. 2d 771 (1979).

c. Stress

Over 30 states now recognize stress as a compensatory illness. In the last ten years the number of mental stress claims has gone from virtually zero to more than 10% of all occupational disease claims. Mental stress claims are now the leading source of occupational disease claims in California. Between 1979 and 1988 the number of such claims in California rose by 700 percent. Gastel, *supra.*

d. Cumulative Traumatic Disorders

Cumulative traumatic disorders are illnesses of the musculoskeletal and nervous system that involve damage to tendons, tendon sheaths and related bones, muscles and nerves of the hands, wrists, elbows, arms, back or legs. They are conditions that result from repetitive motion or exposure rather than a single traumatic event. Fletcher, *Cumulative Trauma Disorders; Repetitive Motion Cases Cost Billions Annually*, Business Insurance, 2 (Sept. 10, 1990).

The statistics for cumulative trauma disorders are staggering. In 1988 the U.S. Department of Labor estimated that 48% of all work place injuries were the result of repetitive motion. In 1988 the Bureau of Labor Statistics reported 115,400 of such injuries, which was a 58% increase from the 72,900 cases reported in 1987. Gastel, *supra.*

Cumulative traumatic disorders are a major and ongoing problem in the meat industry, especially in packing and slaughterhouses. While meat industry cases have focused primarily on processors, these disorders can occur in any segment of the meat industry where repetitive work tasks are involved.

e. Infectious Diseases

Employees who constantly work with animals and come into physical contact with them during handling operations may contract an infectious disease from the animals. For example, brucellosis is a disease that can be transmitted from animals to humans. The primary carrying agents of brucellosis are cattle and swine. Brucellosis in employees has been the subject of a number of workers' compensation cases. Some courts have refused to recognize an employee's brucellosis as an occupational disease, because of its infrequency among workers who handle cattle or swine.

Those courts, while they concede the connection between brucellosis in humans and the handling of infected cattle and hogs, do not believe that the disease occurs with enough regularity in people to be the usual and expected result of such work. *Wilson Foods Corporation v. Porter,* 612 P. 2d 261 (Okla. 1980); *Ridley Packing Co. v. Holliday, Okla.,* 467 P. 2d 480 (1980).

Other courts, however, have not been reluctant to declare brucellosis in employees to be an occupational disease. For such courts, it is enough that the disease of brucellosis in humans is an incident of handling and working with cattle and swine, regardless of the frequency of the occurrence. *Fluker v. Sunnyland Foods,* 469 So. 2d 586 (Ala. 1985).

Furthermore, some of the courts, that have not recognized brucellosis as an occupational disease, have still allowed employees to collect workers' compensation benefits on the basis that the employee sustained an accidental injury while on the job. These cases usually involve workers who received cuts or scrapes while on the job and then became infected. *Mid-South Packers, Inc. v. Hanson,* 253 Miss. 703, 178 So. 2d 689 (1965). Some courts have simply decided that brucellosis may be an occupational disease or an accidental injury. *Baldwin v. Jensen-Salsberry Laboratories,* 708 P. 2d 556 (Ct. App. Kan. 1985). The final determination simply depends on the facts of the case. Regardless, brucellosis in an employee is still compensable.

f. Occupational Loss of Hearing

Courts have also been receptive to finding that hearing loss due to long term exposure constitutes an occupational disease and thus is a compensable claim. While most of these cases have arisen in industrial operations they certainly are by no means confined to operations in which extensive machinery is used. It simply need be proven that the hearing loss results from acoustic trauma suffered over a period of time. Larson, *supra,* § 41.51, 7-423.

2. Unique Problems of Occupational Diseases

Occupational diseases present employers and their insurance carriers with some unique difficulties. One critical problem is that of latency. Unlike traumatic injuries, an occupational disease may not manifest itself until many years after the exposure to the particular hazard. And, when a particular occupational disease does manifest itself, there may be a flood of such cases.

For example, the first asbestos claim against an employer was filed 30 years ago. Since then, state and federal courts have been flooded with such claims. At the beginning of 1990 there were 30,000 asbestos claims in federal courts and 60,000 in state courts. Many of these claims have multiple plaintiffs. It has been estimated that as many as half a million new cases will be filed in the next ten years. Gastel, *supra.*

The long latency period makes it difficult to determine at what point a worker contracted the particular illness. Did the disease result from the first exposure, or some subsequent exposures, or is it the cumulative effect of such exposures? The determination of such issues becomes especially important where the injured worker has worked for a number of employers over a substantial period of time and may have been covered by a number of insurance carriers during that period.

Also, the efforts of employers to take protective measures as to their employees are often frustrated by the courts. For example, in January of 1990 the Seventh Circuit Court of Appeals upheld a ruling that fertile women could be prohibited from taking hazardous jobs that might expose an unborn child to significant health risks.

However, in July of 1990, the Sixth Circuit Court of Appeals ruled that before an employer can implement a fetal protection plan, the employer must demonstrate that infertility is a "bona fide occupational qualification." The standard must be one of business necessity. In other words, the employer must demonstrate that none of the excluded women would be able to work safely in the situation. And, the EEOC, as of October, 1988, issued a policy directive to enforcement officials that employers could not fire women, or refuse to hire them, on the suspicion that their on-the-job exposure to chemicals or radiation might cause reproductive or fetal damage.

III. Employee Tort Actions

Besides legislation protecting their civil rights and on-the-job safety, employees are also protected by a substantial number of common law tort actions that can be filed against employers. A tort is a legal wrong committed by one person against another person and/or their property. The following is just a sampling of the more common tort actions filed by employees about which employers need to be cognizant as employers.

A. Negligent Hiring and Retention of Employees

All employers including agricultural employers, must use reasonable care in selecting new employees. Employers have a duty to protect current employees, and third parties, from employees whose actions cause a risk of harm to others. Allison C. Blakley, *Employer-Employee Relations: Employment Torts Come of Age; Increasing Risks of Liability for Employers and Their Insurers,* 24 TORT & INSURANCE LAW JOURNAL 268, 270 (Winter, 1989). A negligent hiring and retention case can arise from hiring an employee who is unfit for his or her duties. Fitness, of course, varies with the job at issue. *Id.* at 270. For example, if an agricultural employer uses heavy equipment in his or her farming activities (and who doesn't?) the employer would need to hire employees capable of handling such equipment. If an employee was then injured by the negligent actions of an inexperienced co-worker, the employer could be liable to the injured employee under the negligent hiring and retention doctrine.

Negligent hiring and retention cases can also arise where an employee intentionally abuses other employees or third parties. The abusive employee is also an "unfit" employee. A good example of such an employee is one who sexually harasses other employees. Not only is sexual harassment a Title VII violation, it also can be a separate independent tort action. *Id.* at 271. In one case, an employer was sued by employees for the negligent hiring and retention of a co-worker who made sexually suggestive remarks to other workers. The offended employees had repeatedly complained to the company's general manager

who, despite having authority to hire and discharge employees, refused to discharge or discipline the abusive employee. *Hogan v. Forsyth Country Club,* 79 N.C. App. 483, 340 S.E.2d 116, *rev. denied,* 317 N.C. 334, 346 S.E.2d 140 (1986).

To establish the employer's liability in a negligent hiring case, the complainant must prove that (1) the employee who caused the injury was unfit for his or her employment; (2) the employer's hiring (or retention) of the unfit employee was the proximate cause of the injury; and (3) the employer knew, or should have known, of the employee's unfitness. Blakely, *supra,* at 270.

Because an employer rarely has direct knowledge of an employee's unfitness, many of these cases hinge on the extent of the employer's prehiring background check of the unfit employee. Did the employer do what a reasonably prudent person would have done in investigating the unfit employee's prior work history, including checking references? If the employer had conducted a more thorough background investigation, would the employer have discovered the employee's unfitness? *Id.*

Given the substantial compensatory and punitive damage awards possible in negligent hiring (and retention) cases, all employers can expect a future increase in these actions. To reduce exposure to this type of action, an employer should verify that a job applicant possesses the necessary licenses and certificates required by the job. An agricultural employer should also check with the applicant's former employers as to job performance and relationships with other employees. If possible, state and federal authorities should be contacted as to the applicant's criminal record. Unfortunately, many states will not permit police departments to provide employers with certain criminal records of prospective employees. JACKSON & SHIELDS, *supra,* at 294.

B. Defamation

Any communication may be defamatory if it is false and tends to injure the employee. Defamation can take two forms: slander, which is defamation through speech, and libel, which is defamation by the written word. Jackson & Shields, *supra*, at 257. "Defamation actions are gaining popularity in a variety of employment-related contexts. Current employees may allege defamation in connection with performance evaluations, workplace investigations, drug testing, or, most recently, AIDS-testing. Former employees may allege defamation related to their terminations or to post-employment references." Blakely, *supra*, at 272 & footnotes 14 through 18 for case citations.

Often, work place defamation is *per se* defamation in that the libel or slander directly affects the aggrieved employee's job or profession. *Per se* defamatory communication is presumed to be injurious and the defamed employee is not required to prove special or actual damages in order to recover. Jackson & Shields, *supra*, at 257. Examples of *per se* defamation include remarks denigrating an employee's business abilities, allegations of criminal conduct, and statements indicating that an employee has a venereal disease.

Blakely, *supra*, at 272, citing Restatement (Second) of Torts § 559.

There are a number of defenses available to an employer accused of defamation. Truth is an absolute defense to the employee's defamation action. "Qualified privilege" may also be raised as a defense. The "qualified privilege" defense is available if the employer possessed a good faith belief that the statement was true, served a legitimate business purpose, and was published to an appropriate individual who had a legitimate business purpose in receiving the information. Blakely, *supra*, at 273. Qualified privilege, however, is not a defense if (1) the communications are made to individuals who have no legitimate business reason for knowing the information, and (2) when the employer acts with malice—a reckless disregard for the truth and an intent to injure the employee. Jackson & Shields, *supra*, at 259.

C. Invasion of Privacy

An invasion of privacy can occur (1) by appropriating one's name or likeness; (2) through an unreasonable intrusion upon another's solitude or seclusion; (3) through publicity or disclosure that unreasonably and publicly places a person in a false light; and, (4) through the unreasonable publication or disclosure of private facts about another. Restatement (Second) of Torts (1977). Although an employer could commit any one of the four described invasions, most cases involving employers arise out of a public disclosure of private facts concerning an employee. *See* Jackson & Shields, *supra*, at 248-250 for examples of invasion of privacy cases involving causes of action (1) through (3).

If an employer publicly discloses private facts about an employee, without the disclosure serving any legitimate business purpose, the employer may be subject to an invasion of privacy lawsuit. The truthfulness of the revealed facts is not a defense to the employee's cause of action. The invasion of privacy cause of action stems from the fundamental doctrine that each of us has a right to be left alone. Blakely, *supra*, at 274.

A common source of privacy litigation is the public disclosure of information contained in personnel files. Such files contain confidential information (e.g., medical history) and other sensitive information from sources such as completed application forms. The disclosure of such information to other employees could result in an invasion of privacy claim, unless the other employees had a legitimate reason to have that information. *See Bratt v. IBM,* 392 Mass. 508, 467 N.E.2d 126 (1984).

Many states have enacted statutes specifically limiting an employer's right to invade an employee's privacy. State statutes not only prohibit the unreasonable disclosure of an employee's personnel and work records, but also limit drug and alcohol testing, AIDS testing and polygraph testing. Jackson & Shields, *supra*, at 247, 250.

Defenses available to an employer accused of invading an employee's privacy include justifiable business reason, disclosure because of a need to know, employee consent or

waiver, qualified privilege, information was not made public, information was not private, disclosure was required by law and employee suffered no damages or harm. *Id.* at 251-253.

D. Infliction of Emotional Distress

The infliction of emotional distress theory of recovery is extremely broad and is often referred to as the "catch-all" tort theory in employer-employee relations. The tort arises out of conduct that is outrageous and intolerable in a civilized society. Copeland, *supra*, at 33. Infliction of emotional distress cases tend to overlap with other independent tort actions. Examples of conduct which can give rise to this cause of action include invasions of privacy, verbal or physical harassment, false performance appraisals, and exposure to toxic substances. *Id.* at 33; *see also* Blakely, *supra*, at 275.

An infliction of emotional distress case can arise where an employee is hypersensitive, provided the employer knows of the employee's hypersensitivity. For example, if an employer forced an employee who was claustrophobic to work in a closed or narrow space, and the employer knew of the employee's condition, the employer would be vulnerable to an infliction of emotional distress claim. *See Brown v. Ellis,* 40 Conn. Supp. 165, 484 A.2d 944 (1984) (employer forced photographer, who was known to be afraid of heights, to take aerial photographs).

E. Assault and Battery, and Related Quasi-Criminal Conduct

Assault and battery are intentional torts. Assault is the threat to inflict injury to another person, while battery is the act of inflicting the injury. Like the intentional infliction of mental distress, assault and battery cases arise in conjunction with other torts, such as sexual harassment. A fertile source of assault and battery cases is false imprisonment claims. False imprisonment cases often occur when an employee is detained in relation to an investigation of work place theft. In a false imprisonment case it must be shown that the imprisonment resulted from actual force, or by an express or implied threat of force. Jackson & Shields, *supra*, at 276-279.

Polygraph testing, drug testing and exposure to toxic substances have also resulted in assault and battery cases. Blakely, *supra*, at 277, citing *Beauchamp v. Dow Chemical*, 427 Mich. 1, 398 N.W.2d 882 (1986) (research chemist alleged that Dow assaulted him by exposing him to "Agent Orange").

F. Wrongful Termination of Employment

Just as an employer must be careful in hiring an employee, an employer must also be careful in terminating employment. In the absence of an express contract of employment, most employer-employee relationships traditionally have been regarded as "at will." The hallmark of an employment at-will was, until recent years, the fact that either the employer or employee could terminate the employment relationship at any time and

without justification. 9 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017 (3d ed. 1967). The employee served entirely at the employer's pleasure, yet was equally free to "walk away." Today, however, employers do not have unfettered discretion to fire employees. Instead, state law often permits a fired employee to recover damages from his former employer unless the employer can show good cause for the dismissal. *See e.g. Fortune v. National Cash Register Co.,* 364 N.E.2d 1251 (Mass. 1977); CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS 142 (1989 and Supp. 1991).

To understand what circumstances may give rise to liability for wrongful termination, an employer must consider (1) what "good cause" for dismissal means, and (2) the potential claims an aggrieved employee may advance against his former boss in a wrongful termination suit. In all jurisdictions, an employer may dismiss an employee if the conduct or performance of the employee provides the employer with "good cause" to terminate. As the Texas Court of Appeals noted in *Lone Star Steel Co. v. Wahl,* 636 S.W.2d 217 (Texas 1982), "good cause is essentially an employer's only defense in a breach of contract action when the employee has been employed for a definite period of time." *Id.* at 220. "Good cause" has been interpreted to mean, among other things: any conduct which constitutes a material breach of the employment contract, RESTATEMENT (SECOND) OF AGENCY § 409(1) (1958), performance that does not measure up to that expected of the reasonably prudent person, *Ingram v. Dallas County Water Control and Improvement District,* 425 S.W.2d 366, 367 (1968), or the employer's good faith belief that the employee's continued employment is not in the employer's best interest. *Pugh v. See's Candies, Inc.* 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981), *aff'd*, 203 Cal.App.3d 743, 250 Cal.Rptr. 195 (1988).

However, it is not enough for an employer to merely claim that good cause for termination existed; he must also be able to rebut the employee's claim of wrongful termination. Although the burden of proving that the dismissal was wrongful is upon the employee, the employer must be prepared to go forward with evidence of "good cause" for termination once the employee has set forth a *prima facie* case of wrongful termination. *Pugh v. See's Candies, Inc.* 116 Cal.App.3d 311, 329, 171 Cal.Rptr. 917, 927 (1981), *aff'd*, 203 Cal.App.3d 743, 203 Cal.Rptr. 195 (1988). Therefore, to effectively avoid liability for wrongful termination, an employer should establish formal procedures for employee performance review and disciplinary action. Detailed evaluations of each employee's performance, as well as records of any disciplinary measures and the reasons for implementing such measures, must be kept in the employer's regular course of business. Whenever appropriate, such records should be signed by both the employer and the employee to demonstrate that the employee had notice of the information contained in the reports.

Three theories of recovery generally are available to the aggrieved employee:

(1) Breach of an express or implied contract not to terminate except for good

cause;
(2) Breach of an implied promise of good faith and fair dealing; and/or
(3) Wrongful discharge as a tortious act.

Here the discussion addresses only those common law "exceptions" to the employment-at-will doctrine that have emerged in recent years. Causes of action may also be based upon violations of various federal or state statutes. For example, under the federal Employment Retirement Income Security Act (ERISA) a cause of action is created for employees who can show that they were discharged for the purpose of preventing payment of pension or disability benefits. 29 U.S.C. § 1140 (1982).

1. Express Contract to Terminate for Cause Only

A former employee who asserts that he was fired in breach of an express or implied promise not to be dismissed except for good cause does not necessarily claim that his employment was governed by a formal, written contract of employment. Instead, he or she will probably base such a contract claim on an alleged promise (whether written or oral, express or implied) inadvertently made by the employer. In *Martin v. Federal Life Insurance Co.* the Illinois Court of Appeals found that an oral promise of job security constituted an enforceable contract not to be terminated except for cause. 440 N.E.2d 998 (Ill. 1982). The plaintiff in *Martin* had been hired as an at-will employee. During the course of his employment, one of his employer's competitors offered the plaintiff a job. In response, the plaintiff's employer promised him job security if he would remain in the position from which he was ultimately fired. The court held that the employer breached his promise in firing the plaintiff without cause, and therefore granted the plaintiff damages. *Id.*

2. Implied Covenant of Good Faith and Fair Dealing

Any employment relationship is, among other things, a contract. In addition to the express promises contained in contracts, courts interpret most contracts as containing an implied covenant of good faith and fair dealing. *Kirke La Shelle C. v. Paul Armstrong Co.,* 188 N.E. 163 (N.Y. 1933). The covenant of good faith and fair dealing generally mean that the parties to the contract promise to do nothing "...which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract...." *Id.* at 171. Although these terms may not be part of the bargain struck between the parties, courts often hold each party bound by such implied covenants as if the covenants were express terms of the contract. Massachusetts was the first state to hold that an employment relationship gave rise to an implied covenant of good faith and fair dealing. *See Fortune v. National Cash Register Co.,* 364 N.E.2d 1251 (Mass. 1977). In that case, a salesperson alleged that his employer had dismissed him in order to avoid payment of large commissions and bonuses due to him under his commission agreement. Although the employer was not technically in breach of the commission agreement, the court held that the employer's act of firing the employee to avoid payment of the commissions was a breach of the employer's implied covenant of good faith and fair dealing. *Id.* at 1256.

3. Wrongful Discharge as a Tortious Act

Some states have recognized a cause of action for wrongful discharge which has nothing to do with agreements between employees and employers. This discussion focuses on how the civil law of certain states condemns an employer's act of firing an employee if the employer acted for a reason which runs counter to notions of public policy. *See, e.g. Petermann v. International Brotherhood of Teamsters,* 174 Cal.App. 2d 184, 344 P.2d 25 (1959). Those states which have recognized a "public policy exception" to the employment-at-will doctrine permit a wrongfully discharged employ to recover in tort if he or she can show the termination of employment to be repugnant to established public policy.

In *Petermann v. International Brotherhood of Teamsters,* a union employee refused his employer's request to commit perjury before a legislative investigatory committee. The employee was fired by his employer in retaliation for giving truthful testimony before the committee. The California Court of Appeals found that it would be:

> ...contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to [violate the law] *Id.* at 188.

The public policy exception is also triggered when the employee is discharged for exercising a vested or statutory right, since the firing works to undermine the recognized rights of the employee or objective of the legislature. Such claims frequently arise when an employee is allegedly discharged in retaliation for filing a workers' compensation claim. *See, e.g. Niblo v. Parr Mfg., Inc.,* 445 N.W.2d 351 (Iowa 1989); *Southwest Forest Industries, Inc. v. Sutton,* 868 F.2d 352 (10th Cir. 1989).

To help avoid liability for wrongful discharge, the agricultural employer should keep in mind the following:

(1) Guard against making inadvertent representations of permanent or secure employment, either through oral statements or written policies in employee manuals, memoranda, etc.;
(2) Understand what constitutes "good cause" for discharge when making a decision to dismiss an employee;
(3) Maintain complete and accurate employee files.

IV. Basic Employment Laws and Regulations

All employers must comply with a variety of federal laws designed to eliminate and correct labor conditions detrimental to the financial and physical well-being of workers. (OSHA requirements have already been reviewed in this chapter). The following is a brief summary of some additional major federal statutes with which employers must comply. Many of these statutes also have state counterparts about which employers must be equally cognizant. Individual state acts are not reviewed in this section.

A. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 *et seq.*; *see also* 29 C.F.R. Part 780, was enacted by Congress in 1938 as a means of economic recovery from the Depression. The FLSA requires employers to provide employees a minimum wage, equal pay and a minimum work week.

1. Minimum Wage

The FLSA establishes a minimum wage for employees engaged in commerce or the production of goods for commerce, or for employees employed in a business engaged in commerce, or in the production of goods for commerce in any work week. Commerce is defined as trade, commerce, transportation, transmission or communication among the several states, or between any state and any place outside thereof. The courts have adopted an extremely broad view of the FLSA and have held that it applies as to employees whose activities merely "affect" commerce, either directly or indirectly. Jackson & Shields, *supra*, at 389-91.

Currently, employers are required to pay employees a minimum wage of $4.25 per hour. Although the minimum wage is stated on an hourly basis, employees can also be paid on salary commissions, piecework, biweekly, or under any other arrangement so long as the wages equal or exceed the minimum wage. To determine whether the minimum wage is being paid, the hours worked per week is the standard of measurement. For example, a worker being paid $225.00 per week would meet the minimum wage requirement ($225.00/40 hours = $5.65 per hour). If, however, the same worker were being asked to work 60 hours a week for $225.00 then the FLSA would be violated by the employer ($225.00/60 hours = $3.75 per hour). *Id.* at 391-92.

In some instances, employers can pay employees less than the statutory minimum wage. Certain workers, such as apprentices, messengers and full-time students can be paid lower rates if they are employed according to special certificates issued by the Department of Labor. *Id.* at 392.

2. Equal Pay Act

In 1963 the FLSA was amended by the Equal Pay Act (EPA). The EPA makes it unlawful for an employer to discriminate on the basis of sex as to wage rates. Male and female employees must be paid the same wage rate if they perform jobs requiring equal skill, effort and responsibility and if the jobs are performed under similar working conditions. *Id.* at 411. As a general rule, the EPA applies to the same workers protected by the FLSA. The EPA, however, also protects certain workers exempted from the FLSA including bona fide executives, administrative professionals or outside sales persons. *Id.*

While the EPA prohibits wage differentials based solely on sex, the Act does not

prohibit differences in wages based on factors other than sex. Factors which have withstood judicial scrutiny include seniority systems, merit and incentive programs, training programs and shift differentials. *Id.* at 413-14.

The department of labor no longer enforces the EPA. Since July 1, 1979 the administration and enforcement of the EPA has been the responsibility of the Equal Employment Opportunity Commission (EEOC).

3. Minimum Work Week

The FLSA also requires employers to limit the employee's work week to no more than 40 hours per week, unless overtime is paid. Workers who are required to work more than 40 hours per week must be compensated for each hour worked in excess of 40 hours in a work week at a rate of not less than one and one-half times their "regular rate of pay." *Id.* at 393.

"Work week" is defined by the regulations of the wage and hour department as "a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods." "Hours worked" includes time spent by an employee on his or her principal duties and incidental activities. "Regular rate" is simply the employee's hourly rate. *Id.* at 393

4. Child Labor

The FLSA also prohibits the use of oppressive child labor. Child labor is oppressive if a minor is employed below the minimum age specified for a particular occupation. Generally, the minimum age for employment is sixteen years of age. *Id.* at 416. However, state labor laws often set other age limits and restrictions on the use of child labor. Both federal and state laws require that children must be eighteen years of age to work at jobs deemed to be "hazardous occupations." The Secretary of Labor makes the determination of what is hazardous and current designations include construction work, demolition activities, mining and handling radioactive substances, among others. State laws often expand the list of hazardous occupations. Given the injury statistics associated with agriculture, it is conceivable that almost any agricultural activity is hazardous. Certainly, as to the handling of chemicals, live animals and heavy machinery, agriculture is a hazardous occupation.

While sixteen years of age is the standard minimum age for non-hazardous occupations, the regulations do authorize the hiring of fourteen and fifteen-year-old children in some circumstances. Children in this age group can be employed if their employment is performed outside of school hours; is performed between the hours of 7:00 AM and 7:00 PM (except during the summer, when they can work until 9:00 PM); they work only three hours per day on school days and eight on non-school days; and work no more than eighteen hours per week when school is in session and no more than forty hours per week when school is not in session. Working must not interfere with a child's

schooling, health or well-being. *Id.* at 417.

5. Record Keeping

The FLSA requires employers to keep certain records concerning covered employees. Although the Department of Labor (DOL) does not mandate the form of the records to be kept, the DOL does set forth the information to be preserved. It is no defense to an alleged wage and hour law violation that the employer's records are insufficient. In fact, the failure to keep accurate records creates a presumption in favor of the employee that a violation did occur. The following information must be kept by an employer as to each employee:

- Employee's name in full including any identifying name or symbol used in place of the name on any other records;
- Home address (with Zip Code);
- Date of birth if employee is less than nineteen (19) years of age;
- Employee's sex, and the occupation in which employed;
- Time of day and day of the week on which the employee's work week begins;
- Regular hourly rate of pay and the basis on which wages are paid;
- Hours worked each workday and total hours worked each work week;
- Total daily or weekly straight-time earnings or wages;
- Total weekly premium pay for overtime hours worked;
- Total additions to or deductions from wages paid each pay period;
- Total wages paid each pay period; and
- Date of payment and the pay period covered by payment. *Id.* at 395.

Records on employees must normally be kept for a minimum period of three years. Records which should be kept include time cards, earning cards, or any other records which contain daily beginnings and ending times when those amounts determine employee wages; and records reflecting wage deductions and additions. *Id.* at 395.

6. Enforcement

The FLSA is enforced by the Wage and Hour Division of the Department of Labor. The DOL uses the services of state and local agencies to ensure FLSA compliance. Under the FLSA, either an employee or the Department of Labor may bring a suit for a FLSA violation. *Id.* at 396. The relief available to the DOL includes injunctive relief to prohibit further FLSA violations, criminal penalties and monetary relief in the amount of unpaid wages. In the case of willful violations, liquidated damages equal to the amount of unpaid wages may also be imposed. *Id.* at 396.

A two-year statute of limitations applies to the recovery of back pay. In a typical investigation, a wage and hour investigator will review records for the past two years. If,

however, the violation is willful, a three-year statute of limitations applies and the investigator will review records for the past three years. *Id.*

B. Major Federal Employment Tax Laws

Employers must fulfill the requirements of three major federal employment tax laws: the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA) and the Internal Revenue Code withholding requirements. To comply with the three tax provisions described hereinafter, the employer should consult a qualified accountant:

1. Federal Insurance Contributions Act (FICA)

The FICA, 26 U.S.C. § 3101 *et seq.,* commonly known as Social Security, provides a variety of Social Security benefits, including hospital and medical insurance, disability benefits, survivor benefits and retirement. General revenues and federal insurance premiums fund FICA hospital and medical insurance provisions. All other benefits are funded from payroll taxes collected directly from employees, employers and from self-employed persons covered by Social Security.

An employer is required to correctly record the employee's social security number. To report Social Security taxes, the employer must have an employer identification number (EIN) obtained from the local Internal Revenue Service or Social Security Administration office. The EIN application must be completed by the seventh day after the first payment of wages subject to FICA.

To comply with FICA the employer must deduct the Social Security tax when wages are paid. The current amount of Social Security tax to be deducted from each employee's earnings is 7.65%. Employers are taxed for FICA the same rate as employees. Employers must deposit FICA income tax withholding at scheduled intervals with an authorized financial institution or a federal reserve bank.

2. Federal Unemployment Tax Act

The Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3301 *et seq.,* requires employers to pay an unemployment tax based on the employer's payroll. The FUTA is administered in conjunction with the unemployment insurance provisions of the Social Security Act. The objective of unemployment insurance is to provide workers with at least a partial income during temporary periods of involuntary unemployment. Unemployment insurance is a state-administered program with federal participation. Currently, the tax rate for federal unemployment insurance is 6.2% of the wages paid by the employer during the calendar year of employment.

3. Withholding Federal Income Taxes

The Internal Revenue Code requires all employers to deduct and withhold taxes on wages paid to their employees. 26 C.F.R., Subpart E, sections 31.3401(a)-1 *et seq.* The Internal Revenue Code defines wages as all remuneration, cash, checks, bonds and other value paid for services provided. The deduction must be made in accordance with federal income tables or computational procedures prescribed by the U.S. Department of the Treasury.

V. Protecting Yourself from Employee Claims

Although an agricultural employer may seem overwhelmed by the statutes protecting employees' rights, and even be fearful of the common law tort doctrines available to employees, there are some protective measures that can be taken to lessen any employer's exposure to employee claims. Protective measures include risk management techniques and adequate insurance coverage.

A. Risk Management

Risk management merely consists of anticipating, recognizing and eliminating problems. An number of risk management measures have already been suggested throughout this chapter. Of course, the most effective risk management is compliance with the law. However, to avoid even inadvertent violations of employees' rights any employer should develop a risk management plan. Key elements of a risk management plan include:

1. The implementation of non-discriminatory hiring practices and guidelines;
2. Careful screening of potential employees, including checking references;
3. Properly training employees, including the use of equipment;
4. Providing regular 15-minute work breaks to lessen fatigue and the possibility of injury;
5. The establishment of safety regulations which are made known to employees and are enforced by management;
6. The formulation of policies that respect employee privacy;
7. The formulation and enforcement of policies that prohibit on-the-job discriminatory conduct, including sexual discrimination and harassment. Copeland, *supra*.
8. The establishment of job descriptions which are communicated to employees;
9. The regular use of job performance appraisals; and
10. Documentation of the reasons necessitating the termination of employment.

More than anything else, the employer must be sensitive to his or her employees' complaints. The employer should make it a practice to thoroughly investigate any danger or difficulty brought to the employer's attention by employees. The employer must also be willing to take prompt remedial action when needed. Copeland, *supra*, at 34.

B. Insurance Coverage

To at least limit the financial exposure to employee's claims of wrong doing, an agricultural employer must be adequately insured. Unfortunately, many agricultural employers do not have liability coverage as to their employees.

1. Farmers Comprehensive Personal Liability Policy

Many agricultural employers are relying upon a farmers comprehensive personal liability policy (FCPL) to protect them from all liability claims, including those filed by employees. Certainly, the overwhelming number of farmers rely upon "FCPL policies for such protection.

Although the FCPL policy protects the insured farmer from the claims of third parties injured by the negligent conduct of the farmer's employees, the employees are not always financially protected from the negligent conduct of their employers. Many policies provide that the insurer is not liable for bodily injury to any farm employee, or is not liable unless the employee is specifically designated as covered in the policy. *See, e.g. Finegan v. Lumbermens Mut. Cas. Co.,* 329 F.2d 231 (D.C. Cir. 1963) (a farm employee injured during course of employment was not covered under the farmer's FCPL because the policy excluded injuries to employees, unless specifically declared in the policy, and the farmer failed to declare the employee). *See also Farmers Home Mut. Ins. Co. v. Lill,* 332 N.W.2d 635 (Minn. 1983) (employee injured in bailing accident not covered because no premium charge had been made for farm employee). Such an exclusion places both the employee and employer at risk because the lack of insurance funds may severely affect both parties. As a result, there is often conflict between the insurer, the insured, and the injured party as to whether the injured party is an employee.

The courts have included under FCPL coverage those persons who occasionally help out on a farm or only work a few hours for minimum pay. The courts have also permitted farm neighbors to exchange labor without creating an employer-employee relationship. The following examples are useful in understanding what the courts have done.

a. Gratuitous Activity

Austin - St. Paul Mutual Insurance Co. v. Belshan, 297 Minn. 522, 211 N.W.2d 517 (1973), involved an FCPL policy that excluded bodily injury coverage for any farm employee. The insured hired a worker to mow hay on the insured's farm. During a work break, the worker assisted the insured in repairing a piece of broken machinery. While helping with the repairs, a piece of metal struck the worker in the eye. The Minnesota Supreme court held that the employee exclusion did not apply because the worker was no longer mowing hay and was involved in a purely gratuitous activity. *Id.* at 523-24, 211 N.W.2d at 518.

b. Casual Employee

In *Huntington Mutual Insurance Co. v. Walker*, 181 Ind. App. 617, 392 N.E.2d 1182 (1979), the insured farmer's policy excluded coverage for employees injured as a result of the insured's negligence. A tree trimmer working on the insured's farm was injured when the insured moved a tree limb with a tractor. *Id.* at 620, 392 N.E.2d at 1184. The insurance company pleaded the employee exclusion. The court, however, found the term "employee" to be ambiguous. *Id.* at 621, 392 N.E.2d at 1185. The court also found the tree trimmer to be a "casual" employee who was not excluded under the policy. *Id.*

c. Neighborly Exchanges

In *Maurer v. Krueger,* 363 N.W.2d 830 (Minn. 1985), a farmer's hand was crushed between a feed bunk and a tractor bucket when he assisted a neighboring farmer in moving several feed bunks on his neighbor's property. *Id.* at 831. His neighbor's insurance company contended that the accident was not covered under the neighbor's FCPL policy because the assisting farmer was an employee. *Id.* at 830, 831.

The evidence showed that the two farmers frequently exchanged labor back and forth on their farms. Only if one farmer helped the other more during a given period was there ever an exchange of cash. Also, the parties did not carry each other as employees on any state or federal reports. As a result, the court refused to find an employer-employee relationship and the insurance company was not permitted to raise the employee exclusion as a coverage defense. *Id.* at 831.

d. Occasional Employees

A good example of a court refusing to apply the employee exclusion to an "occasional employee" is *American Reliance Insurance Co. v. Mitchell.* 385 S.E.2d 583 (Va. 1989). The case arose when three neighboring farmers, Owens, Mitchell and Inman, orally agreed to harvest Owens's hay "on shares." As their contribution to the venture, Mitchell and Inman were to provide the equipment and hire workers, as well as cut, collect and store the hay. *Id.* at 584.

One of the workers was Mitchell's fourteen-year-old grandson, who was recruited at the last minute by Inman's thirteen-year-old son. While taking harvested hay from the field to the barn, Mitchell's grandson, who was riding on top of the hay, was thrown off and injured when the hay truck struck a mudhole. *Id.*

The boy's parents filed a claim on the basis that their son's injuries were caused by a lack of supervision of his activities and the negligent operation of the hay truck. The insurer denied coverage because of the employee exclusion clause. *Id.*

A trial was held on the coverage issue. Inman testified that, although he had not

given much thought about payment to the boys, he would have paid them something. The evidence also showed that in the past, when Mitchell's grandson had assisted him, the boy had occasionally been compensated for his labor. *Id.* The evening following the accident, Inman paid both boys $10.00. *Id.* at 585. Oddly enough, the $10.00 was paid upon the advice of the insurance agent who sold the FCPL policies to Owens and Inman. The agent contended that payment to the boys was necessary to "invoke coverage."

The court refused to apply the employee exclusion. The court held that the term "employee" usually describes the continuous service of a person who works full time for another for consideration. Although the term can refer to a person who engages in part-time, casual or incidental work, with or without compensation, the term's possible dual meaning makes the term ambiguous. When a term is ambiguous, the doubtful language is to be interpreted to include coverage. *Id.* at 586.

The court found that the injured minor's employment was not permanent or regular, but only occasional. As a result, he was not an "employee" for the purpose of excluding coverage. *Id.*

2. Medical Payments and the FCPL

Many of the FCPL policies also exclude medical payments for farm employees unless such coverage is specifically added. They also exclude coverage for any "other persons" engaged in work "incidental to the maintenance or use of the premises as a farm." FC&S Bulletins, *supra* note 17, Aug. 1990, at Farms Ap-9. This exclusion does not apply, however, to persons injured on the property while involved in a neighborly exchange of assistance for which the insured is not obligated to pay any money. For there to be medical coverage for a neighbor injured while assisting a farmer, the situation must be a typical neighborly exchange with the insured performing services in return. Furthermore, there must be no obligation on the part of the insured to pay money for the help. This feature applies only to injuries that happen on the insured premises. *Id.*

3. Inclusion of Employees

An employer's liability and employee's medical payments endorsement can be added to an FCPL policy to provide farm employers liability coverage. The endorsement covers the insured for liabilities arising out of a farm employee's injury.

> For there to be coverage three conditions concerning the injury must be met: (1) it must be caused by an occurrence; (2) it must be sustained by a "farm employee"; (3) it must arise out of and in the course of the employee's employment and duties relating to the ownership, maintenance, or use of the "insured location" owned or operated for "farming purposes." *Id.*
>
> The bodily injury need not occur on the insured location. If employment duties take

the farm employee off the location and the employee is injured, coverage still exists. *Id.*

Even if the policy covers injuries to employees, a number of exclusions restrict or eliminate the coverage. For example, coverage does not apply to liabilities arising out of injuries to a farm employee if the injuries are in the scope of workers' compensation coverage, disability benefits, or unemployment compensation, or any similar laws. *See Oregon Farm Bureau v. Thompson,* 235 Or. 162, 378 P.2d 563, *reh'g denied,* 235 Or. 162, 384 P.2d 182 (1963); *Bakel v. Colorado Farm Bureau Mut. Ins. Co.,* 512 P.2d 285 (Colo. App. 1973).

Other exclusions which apply to farm employer's liability coverage include:

> "(1) any contractually arranged obligation; (2) any claims or suits brought against the insured more than 36 months after the end of the policy period; (3) an employee's operation or maintenance of aircraft, if it is designed to carry people or cargo; (4) injury to an illegally employed person, if the insured has knowledge of the illegal employment; (5) punitive damages for injury to any employee employed in violation of law; and (6) consequential damages sought by the spouse, child, parent or sibling of an injured "farm employee." FC&S BULLETINS, *supra,* Aug. 1990, at Farms Apf-2. *See Tisdale v. Hasslinger,* 79 Wis. 2d 194, 255 N.W.2d 314 (1977) (an 11 year old, injured while operating a hay baler on the insured's farm, was not covered as an employee because state law specifically forbid anyone under 16 years of age from operating farm tractors or self-propelled vehicles). *See also Farm Bureau Ins. Co. v. Pedlow,* 3 Mich. App. 478, 142 N.W.2d 877 (1966) (15-year-old boy injured while operating a defective manure spreader was not an employee because state statute prohibited any person under age 18 from cleaning moving machinery or being employed in any hazardous job).

In addition to providing compensation for bodily injury, the employer's liability and employees' medical payments endorsement also covers medical payments for employees.

Expenses must be incurred or ascertained within three years of the date of the accident causing the bodily injury. Also, only reasonable medical expenses are covered. Reasonable medical expenses include first aid, medical, surgical, X-ray, and dental services; prosthetic devices; and ambulance, hospital, professional nursing, and funeral services. Payments under the policy are excluded, however, if the insured voluntarily provides, or is required to provide, benefits under any workers' compensation, disability benefits, or unemployment compensation law, or any similar law. FC&S BULLETINS, *supra,* Aug. 1990, at Farms Apf-2.

4. Workers' Compensation

The material on workers' compensation is taken from the following: J. Copeland, *Workers Compensation: (Protect Employees; Protect Yourself),* 33 National Hog Farmer 36

(May 1991). The material is used with the permission of the National Hog Farmer.

An agricultural employer should also explore the possibility of obtaining workers' compensation insurance. In some states, workers' compensation coverage is compulsory even for agricultural workers.

a. Compulsory Workers' Compensation

In analyzing insurance needs, a farmer must first determine whether state law makes workers' compensation insurance coverage compulsory. At least a dozen states require workers' compensation coverage be provided for agricultural workers in the same manner as their non-agricultural counterparts.

In those states, if you fail to purchase compulsory workers' compensation insurance, you lose certain common-law defenses in any lawsuit filed by an injured employee. For example:

- *Contributory Negligence.* This defense looks at the employee's own carelessness. If the injury is more the fault of the employee than the employer, the employee's recovery is either denied, or reduced.

- *Assumption of Risk.* This defense applies if the employee was aware of the work dangers and chose to be exposed to the dangers. In this situation, he or she may not be entitled to compensation.

But remember, both of these defenses may be lost if compulsory insurance is not obtained.

Second, the employer loses the benefit of any other liability insurance he or she might have. Liability policies commonly state that there is no coverage under the policy for injured employees when state law requires them to be covered under workers' compensation insurance.

b. The Agricultural Exemption

A majority of states exempt some farm laborers from state workers' compensation statutes. However, there is a lot of variation between states. Some exclude all agricultural workers. Others exclude only the workers of farmers who employ less than a certain number of employees, have an annual payroll less than a certain amount, or whose employees work less than a specified number of hours each year.

In interpreting the state exemption for agricultural workers, some courts have found concentrated poultry or hog operations to be commercial activities outside the "agricultural" exemption. In those cases, workers' compensation insurance was found to be compulsory.

Similarly, if an employee regularly shifts from strictly farm work to an assignment of some non-farm work, even if an agricultural exemption exists, the worker must be covered by workers' compensation insurance. An employer who has an employee constantly operating or repairing non-farm machinery, or repairing other non-farm equipment or buildings, may find the agricultural exemption inapplicable if the worker gets injured.

Even those states that exclude agricultural workers from compensation coverage, however, usually give the employer the right to bring their agricultural workers under the state's workers' compensation act. Any agricultural employer who has the opportunity to elect to bring his workers under a state workers' compensation statute should seriously consider doing so, because of the financial security it provides the employer, as well as the benefits it provides the employee.

c. The Case for Workers' Compensation

While state law may make workers' compensation insurance coverage optional for agricultural employers, it does not give the employer immunity from lawsuits filed by injured employees. The employer is obligated to compensate an injured employee if the employee's injuries result from the employer's negligence or failure to fulfill a duty owed the employee.

Employers must provide employees with a reasonably safe workplace and safe tools. Employers must issue rules and warnings so that work can be done in safety, and they must ensure their co-workers are reasonably competent. If the employer breaches any of those duties, and the employee is injured, then the employer is financially responsible.

Workers' compensation insurance offers both advantages and disadvantages to the employer and the employee. For the employer, in most situations, it provides the exclusive remedy to claims filed by an employee. For example, the worker who is entitled to compensation under a state workers' compensation act cannot sue the employer under state product liability laws, wrongful death statutes or federal statutes such as the Occupational Safety and Health Act (OSHA). *But see Adams Fruit Co. Inc. v. Barrett,* 110 S.Ct. 1384 (1990) in which the U.S. Supreme Court held that state workers' compensation laws do not bar migrant workers from bringing private actions under the Migrant and Seasonal Agricultural Worker Protection Act for intentional violations of the Act.

However, even workers' compensation will not preclude an action by an employee who is intentionally injured by the employer. Similarly, a few states allow an employee to sue an employer outside of the workers' compensation remedy if the employee has been placed in a position where harm is almost certain to occur, regardless of the employer's intent. For example, a group of workers repeatedly exposed to toxic fumes in a manufacturing plant were allowed to sue their employer outside of the workers' compensation statutes because the employer had repeatedly failed to eliminate the toxic

fumes. *Jones v. VIP Dev. Co.,* 15 Ohio St. 3d 90, 472 N.W.2d 1046 (1984).

For the employee, workers' compensation insurance guarantees the employee compensation and medical care, even if the employee was at fault. The employer cannot raise the employee's own negligence or fault as a defense. An insured worker is entitled to compensation for any personal injury caused by an accident or disease arising out of an in the course of employment, so long as the injury is caused by, or related to, the employment.

However, employees will find that they may not be fully compensated for their injuries. Workers' compensation does not provide compensation for impotency, pain and suffering, psychological damage or disfigurement. Instead, the worker is paid according to a schedule of benefits. For each injury, depending on whether the injury is permanent or temporary, the employee will be paid for a certain number of weeks, at a fixed percentage of the worker's average weekly wage, up to a maximum amount.

d. Finding the Right Coverage

If you choose to provide workers' compensation insurance for your employees, you must also decide what insurance is best for you. There are basically three ways of securing workers' compensation insurance under state Workers' Compensation Acts.

- Many states permit what is known as self-insurance which is simply a program whereby the employer regularly sets aside sufficient assets to cover potential liability claims. The states that do permit self-insurance have specific regulations for setting up such programs. For many employers, self-insurance isn't a viable option because of the amount of assets that must be set aside to take care of potential claims.

- In some states it is possible to obtain workers' compensation at competitive rates through a state fund. Information about these funds can be obtained through an insurance agent or the state's Workers' Compensation Commission.

- For most employers, state law (as well as economics) requires purchase of workers' compensation coverage through a private insurance company. Shop around. Insurance company rates for workers' compensation vary greatly. Check for reputation, reliability and financial stability.

There are several services that rate insurance companies. A. M. Best is probably the most well-known. Under its ranking system, the most reliable insurance companies receive an A+ rating. Standard & Poors, as well as Duffy & Phelps, give AAA ratings to the best insurance companies, while Moody's Service identifies the better companies with an Aaa rating. All are helpful in selecting a reliable insurance company.

As far as the actual cost of workers' compensation insurance, it will very greatly with

the type of operation, number of employees and size of payroll. The more employees, the greater the payroll, and the more dangerous the operation, the higher the premiums. An operation's safety record is also a factor.

Summary

An employer must be vigilant to protect the rights of both job applicants and employees. Federal and state statutes guarantee that applicants and employees will not be subjected to discrimination in any aspect of employment, including recruitment, hiring, promotion, compensation and termination of employment. An employer may not discriminate on the basis of sex, race, color, national origin, religion, age, or physical disability.

In addition, common law tort actions give employees powerful causes of action be against those employers who injure employees. More than ever, employers must be diligent in obeying the law. Employers must also take measures to protect themselves from employee claims instituting risk management plans and purchasing adequate insurance coverage.