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EMPLOYMENT LAW UPDATE

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I. Introduction.

Both the federal and state governments have been busy passing new legislation, issuing executive orders and implementing many new requirements for employers. These changes along with recent court decisions require employers to be more proactive in how they develop and implement their employment policies and practices. Mistakes can be very costly! The following are typical example of recent cases that are becoming a common occurrence.

- EEOC wins a settlement of \$750,000 in a sexual harassment lawsuit it filed against the NEA on behalf of three female former employees. What is most interesting (and problematic) is that the manager's behavior that led to the lawsuit, although abusive and belligerent, was not sexual; rather it was directly solely against females!

- EEOC sues a Wal-Mart store on behalf of female employees for sexual harassment. Although the alleged harassment did involve sexual conduct, the store allegedly failed to act after the harassment was reported by the employees. Wal-Mart settled the cases for \$315,000!

- Diane Schleich, 66, lost her job as a secretary with the city of North Lauderdale as a result of budget cuts. She was terminated from the job as secretary, the job she held for 10 years, and filed an age discrimination complaint. "They pulled the rug from right out of me," Schleich said as she wept. At 66, I can't start a career over from scratch. I've been able to find temporary jobs, but none of them were good paying jobs where I could use my expertise and years of experience." A civil court jury awarded Schleich \$75,000 in damages.

The U.S. Equal Employment Opportunity Commission (EEOC) recently boasts a near record high 93,277 workplace discrimination charges that were filed with it and that it has obtained monetary relief obtained for victims totaled over



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\$376 million. Employment lawsuits have risen 400% in the past 20 years to the current level of 6.5 claims per 1,000 employees -- *per year!*

What is causing these record high complaints? A multiple of factors, including greater accessibility of the federal EEOC and Wisconsin ERD to the public, economic conditions, increased diversity and demographic shifts in the labor force, employees' greater awareness of their rights under the law, and changes to the agencies intake practices that cut down on the steps needed for an individual to file a charge. Disgruntled applicants and employees sue first and ask questions later.

There have been several major changes in both federal and state employment laws that employers need to be aware of:

1. New Federal ADA regulations
2. New Federal FMLA regulations
3. New Genetic Information Non-Discrimination law
4. New FMLA benefits for military personnel
5. Wisconsin FMLA benefits for Domestic partnerships
6. COBRA benefits extended and new forms
7. Sex discrimination (wage claims, sexual harassment)
8. ADEA (reduction in force, layoffs, and terminations)
9. Wage and hour issues/compensation plans (commission plans, overtime)
10. Revised I-9 Form (on-line verification)
11. Immigration Issues (On line verification)
12. Wisconsin discrimination penalties substantially increased
13. The Employee Free Choice Act --Come back for Unions?

II. Discussion.

1. The Americans with Disabilities Act (ADA), which covers employers who have 15 or more employees, was amended in 2008, effective January 1, 2009. The amendments greatly expanded the definition of disability. The focus is on reasonable accommodation and what, if any, effort the employer has done to provide the employee with a reasonable accommodation that will allow them to perform their essential job duties.

In summary form, the major amendments to the ADA include the following:

- The definition of disability is expanded: An impairment that is episodic or in remission is considered a disability if it would substantially limit a major life activity when active;



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- Eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating have been added to the list of major life activities;
 - As to the relationship to “work”, the focus does not have to be on the general category of jobs but can be limited to the “type” of work as defined by the nature of the work and specific job related requirements;
 - EEOC will broaden its definition of “significantly limits” beyond its current definition that such has to “significantly restrict” a major life activity to be covered by Act;
 - Employers may not consider mitigating measures (*e.g.* medication) in determining whether an individual is disabled (such as, insulin for diabetes and medication that prevents seizures in an epileptic does not apply for glasses or contact lenses);
 - Lowers the standard to prove an employer has discriminated against an individual who is “regarded as” having a disability to provide that an employer is liable whether or not the impairment actually limits or is perceived to limit a major life activity;
 - Claims for “regarded as” disabled cannot be based on transitory or minor impairments that are expected to last less than six (6) months. Examples include the common cold, sprained ankles, broken bones that are expected to heal.
2. New Federal FMLA Regulations. The Regulations clarifies many issues raised over the past year.
- a. Light Duty. This is not required and the employer does not have to allow employee to return to work. However, if it is offered and accepted by the employee, time spent performing light duty work does not count against FMLA leave entitlement.



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- b. Serious Health Condition clarified.
 - i. Employee visits doctor at least 2 times which occur within 30 days of the beginning of the period of incapacity.
 - ii. Less than 3 consecutive, full calendar days of incapacity plus a regimen of continuing treatment. Also, the first visit to a doctor must take place within 7 days of the first day incapacity.
 - iii. "Periodic Visits" for chronic serious health conditions as "at least two visits to doctor per year."
- c. Substitution of Paid Leave. Employee may take or employer may require
 - i. All forms of leave offered by employer are to treated the same, regardless of type of leave;
 - ii. An employee electing to use paid leave concurrently with FMLA must follow same terms and conditions of employer's policy that apply to other employees for use of such leave. (Employer may waive);
 - iii. Employee can always use unpaid FMLA if unable to qualify for paid leave.
- d. The Notice. Employer must notify employee within five days.
 - i. Whether paid leave will be substituted for unpaid leave.
 - ii. Whether employee will need to have FFD certificate to return to work.
 - iii. Number of hours, days or weeks that will be counted.
 - iv. What happens if employee does not provide a complete or sufficient certificate, the employee's request for FMLA may be denied or delayed. If employee fails to provide medical certificate, the leave is not FMLA.
 - v. Employee on FMLA must follow employer's usual and customary call-in procedures for reporting an absence, about unusual circumstances. If employee fails to follow policy, they can be subject to discipline.



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e. Medical Certificate (Content).

- i. Employee's immediate supervisor cannot contact doctor.
- ii. Employer cannot ask doctor for additional information beyond the reg. cert. form (From WH-380).
- iii. If employer deems information is incomplete or insufficient, can specify in writing what information is lacking and give employee seven calendar days to cure deficiency.

f. Medical Certificate – Timing.

- i. Employer may request a new certificate each year for conditions that last less than one year.
- ii. Can require re-certification every six months for ongoing condition.
- iii. Can still require certificate every 30 days for ongoing condition, unless the condition will last more than 30 days.
- iv. If certificate has specific date, employer must wait to get recertification unless it is over six months.

g. Fitness for Duty.

- i. May require certificates that specifically address employee's ability to perform essential functions of employee's job.
- ii. Where a reasonable job safety concern exists, can require FFD before employee may return to when the employee takes intermittent leave.
- iii. If employee fails to submit properly requested FFD certificate, employer may delay job restoration until such is provided. If it is never provided, employee may be denied reinstatement.

3. New Genetic Information Non-Discrimination Law. GINA prohibits employers from requesting, requiring or purchasing genetic information regarding an applicant/employee or their family member. Cannot discriminate against an applicant/employee based on genetic test. If



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employer obtains genetic information, it must keep the information confidential. Penalties are similar to those under Title VII. GINA went into effect on November 21, 2009.

4. New FMLA benefits for military personnel. The Uniformed Services Employment and Reemployment Rights Act provides expanded benefits to persons on active duty, exigency leave, reserve duty, and National Guard duty. Effects employers with 50 or more employees. Special notice and leave forms can be obtained via DOL website.

Exigency leave: Up to 12 weeks of leave for urgent needs related to a reservist family member (spouse, son, daughter, or parent) call to active service.

Caregiver: Up to 26 weeks of unpaid leave to an employee to care for a family member (spouse, son, daughter, parent, or next of kin) who is injured while serving on active military duty. (includes veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time during the 5 years preceding the date of treatment.)

5. The Wisconsin Domestic Partnership Law was signed into law on 6/29/2009 Governor Doyle.

Employees who have been employed for at least 52 consecutive weeks and have worked a minimum of 1,000 hours, and on an annual period thereafter, can also use their 2 weeks of unpaid medical leave to care for a domestic partner or parent of a domestic partner with a serious health condition.

“Domestic Partner” is defined as either (1) an individual who has filed a declaration of domestic partnership in the office of the register of deeds in the county in which the individual resides. It is a legal relationship which involve individuals who: (a) are 18 or older, (b) are not married, (c) are not related by blood, (d) share a common residence, and (e) are of the same sex, or (2) (a) are 18 or older, (b) are not married or in a domestic partnership with anyone else, (c) not related by blood, (d) share a common residence, (e) consider themselves to be members of each other’s family, and (f) agree to be responsible for each other’s basic living expenses.

Domestic partners can complete a “declaration” in their home counties.



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6. COBRA Premium Subsidy Program.

Second COBRA extension passed (Temporary Extension Act of 2010 (H. R. 4691): On March 3, 2010, President Obama signed into law allowing workers who are involuntarily terminated through March 31, 2010 to qualify for the program. Now, the extended the maximum COBRA premium subsidy period includes those workers involuntarily terminated between September 1, 2008 and March 31, 2010.

The benefit can last up to 9 months – cut short if employee becomes eligible for Medicare or coverage under any other group health plan, such as a plan sponsored by a successor employer or a spouse's employer.

The American Recovery and Reinvestment Act of 2009 (ARRA) enabled certain involuntarily terminated employees to obtain COBRA coverage (for themselves and their beneficiaries) by paying only 35 percent of the otherwise applicable COBRA premium. The coverage provider paid the remaining 65 percent and could then obtain reimbursement through a tax credit.

The 2010 Act did not change the subsidy amount or the fundamental mechanics for facilitating the subsidy. Workers must still otherwise qualify for COBRA continuation coverage because of an involuntary termination of employment for any reason (except gross misconduct) by March 31, 2010. The 2010 Act clarifies that eligibility for the premium subsidy is based on the date of the qualifying termination of employment, not the date the individual would begin COBRA coverage.

For assistance-eligible individuals who reached the end of the original nine-month COBRA subsidy premium period before Dec. 31, 2009, and paid 100 percent of the premium, plan administrators must reimburse the overpayment amount or provide a credit toward future months of COBRA coverage.

Individuals who experienced a qualifying event as the result of an involuntary termination of employment at any time from September 1, 2008 through March 31, 2010 and were offered , but did not elect, continuation coverage or who elected continuation coverage and subsequently discontinued it may have the right to an additional 60 day election period.

Plan administrators must provide additional notice regarding the 2010 Act changes to anyone who was an assistance-eligible individual at any time



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on or after Oct. 31, 2009, or terminated employment on or after Oct. 31, 2009. Plan administrators must provide this additional notification no later than Feb. 17, 2010 (that is, within 60 days after the enactment date of the 2010 Act), or, in the case of a qualifying event occurring after Dec. 31, 2009, consistent with COBRA's normal election notice timing requirements.

Plan administrators must also provide additional notification to any assistance-eligible individual who (1) had COBRA coverage for the original nine-month subsidy period prior to Dec. 31, 2009, and (2) did not timely pay the premium at any time during the transition period. The plan administrator must provide the notice within the first 60 days of the assistance-eligible individual's transition period, and the notice must explain the ability to make retroactive premium payments.

Premium payments are initially due within 45 days after qualified person makes the COBRA election. Thereafter, premium payments are due every 30 days with a 30 day grace period, should the qualified person miss the 30 day due date.

The DOL plans to issue a new set of model notices that incorporate the changes made by the 2010 Act. See DOL's Web site.) Plan administrators should be mindful of the Feb. 17, 2010, deadline to update notices.

7. Sex discrimination (wages and sexual harassment).

On January 29, 2009, President Barack Obama signed the Lilly Ledbetter Fair Pay Act, which provides for retroactive coverage back to May 28, 2007. The Act extends filing deadlines for pay-bias complaints (which is 300 days in most states), by providing that each time compensation is paid pursuant to a discriminatory decision or practice, such constitutes an act of discrimination for purposes of determining the statute of limitations for filing a complaint. In other words, if a female employee was paid less than comparable male employees 8 years ago, due to discriminatory pay practices on the part of her employer, each paycheck she has received since starts a new statute of limitations period, and the employee may file a charge of discrimination years later when she learns of the discrepancy in pay permits employees to sue for wage discrimination, even years after the fact.



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Sexual Harassment:

Male claims are on the rise: From 1990 to 2009, the percentage of sexual harassment claims filed by men has doubled from 8 percent to 16 percent of all claims, according to the EEOC. More than 2,000 were filed in 2009 out of about 12,700 cases.

Sexual harassment is a prohibited form of sex discrimination under federal and state law. Harassment based on membership in any protected class is prohibited and can result in legal liability.

The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature whether such actions are a condition of employment or create a hostile working environment.

Harassment is verbal or physical conduct that shows hostility or aversion toward an individual because of his/her race, color, religion, gender, sexual orientation, national origin, age or disability, that of his/her relatives, friends or associates, and that:

- (1) Has the purpose or effect of creating intimidating, hostile or offensive work environment;
- (2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- (3) Otherwise adversely affects an individual's employment opportunities.

Location of Conduct:

1. Can be liable if acts occur on employer's premises: before work; during work; or after work.
2. Can be liable if acts occur off employer's premises: employer sponsored party, business trip, seminars, employee "get together" at supervisor's or employee's house, after work gathering at a bar.

8. ADEA (reduction in force, layoffs, and terminations).

State and Federal Age claims were up 29% in 2008 – almost a double increase in overall discrimination complaints, which are up 15%. The



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primary focus of ADEA claims are poor and/or no criteria used in making the selections.

When an employer engages in a reduction in force, it has to choose among its workforce which employees are going to stay and who is going to be laid off. If the selection process adversely affects employees over 40 disproportionately, the employer must define the criteria used in the making the selection choices. The defense employers most commonly use is the "reasonable factor other than age." EEOC proposed new guidelines regarding the meaning of "reasonable factors other than age" The proposed rule explains that the RFOA defense applies only if the challenged practice is not based on age, and that a neutral practice that disproportionately affects older workers can be justified only by showing that the practice is objectively reasonable when viewed from the perspective of a reasonable employer under like circumstances.

The test for whether an age-based employment practice is lawful:

Reasonable:

- (1) whether the practice is "reasonable", that is, one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances ... by a prudent employer mindful of its responsibilities under the ADEA ... one who would take care to avoid limiting the employment opportunities of older persons;
- (2) whether the employment practice and the manner of its implementation are common business practices;
- (3) the extent to which the factor is related to achieve a legitimate business purpose and was reasonably administered to achieve that purpose;
- (4) the extent to which the employer took steps to define the factor accurately (using factors such as job performance, skill sets) and to apply the factor fairly and accurately (e.g. training, guidance, instruction of managers);
- (5) the extent to which the employer took steps to access the adverse impact of its employment practice on older employees;
- (6) the severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took



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preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and

- (7) whether other options were available and the reasons the employer selected the option it did.

Factors other than age: (When an employment practice has a significant disparate impact on older individuals, the RFOA applies only if the practice is not based on age. Focus is then on the decision makers.)

- (1) the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
- (2) the extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
- (3) the extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

Acceptable reasons to terminate/lay employees off:

- Documented job performance (e.g. Evaluations).
- Diverse skills (ability to perform multitude of tasks).
- Diverse experience (in prior jobs or currently).
- Seniority (tie breaker when above three are relatively similar).
- Combination of above.

9. Wage and hour issues/compensation plans (exemptions/overtime and commission plans.)

A. Misclassifications of exemptions is becoming a hot area in litigation.

Executive exemption: \$455 a week or \$23,660 a year and whose primary duty is management. This is usually defined as supervising 2 or more full-time employees in a recognized department. Supervise includes right to hire, fire, or recommend same, direction of work, etc.

Administrative exemption: \$455 a week or \$23,660 a year and whose primary work in non-manual and related to management or general business operations with the exercise of discretion and independent judgment in matters of significance to the business. Discretion means the ability to compare and evaluate options and choices in business decisions and be involved in the choices, which have to be significant. (examples



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include HR, accounting and marketing and other jobs "of a nature that run the business as a whole.)

B. Commissions:

Federal law: Three conditions must be met:

1. Employee must be employed by a retail or service establishment,
2. Employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
3. More than half the employee's total earnings in a representative period must consist of commissions.

Unless all three conditions are met, overtime premium pay must be paid for all hours worked over 40 in a workweek at time and one-half the regular rate of pay.

The representative period for determining if enough commissions have been paid may be as short as one month, but must not be greater than one year. The employer must select a representative period in order to determine if this condition has been met.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met.

To determine if an employer has met the "more than one and one-half times the applicable minimum wage the employer may divide the employee's total earnings attributed to the pay period by the employee's total hours worked during such pay period. If the result is greater than time and one-half the minimum wage condition of the exemption has been met.

Wisconsin: All employees must be paid a minimum wage (\$7.25 per hour) in Wisconsin. Employees can be paid commissions. Certain jobs are exempted from overtime compensation: parts persons, salespersons, service managers, service writers, or mechanics selling or servicing automobiles, trucks, farm implements, trailers, boats, motorcycles, snowmobiles, other recreational vehicles or aircraft, when employed by a



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nonmanufacturing establishment primarily engaged in selling such vehicles to ultimate purchasers. S. 274.04(7), Wis. Stat.

C. All pay plans which involve commission employees should be clear and in writing. There should be no question as to when an employee is entitled to get his/her commission and what commissions are due the employee after if the employee is terminated. The Wage & Hour Department will rely on the agreement.

10. Revised I-9 Form.

The USCIS has revised the I-9 Form that should be used by employers when hiring new employees. The Form has the revision date of August 7, 2009. The final rule will make the following changes to the current I-9 form:

- Expired documents will no longer be considered acceptable for proof of identification or work authorization;
- The temporary resident card, and older versions of the authorization card, will be removed from List A;
- Foreign passports containing special machine-readable visas for certain citizens will be added to List A;
- The new U.S. Passport card will be added to List A;
- The employee attestation section will be different.

More information can be found at: www.uscis.gov.

11. New E-Verify.

E-Verify is a voluntary program for employers, with limited exceptions. Companies can access E-Verify online and compare an employee's Form I-9 information with over 444 million records in the SSA database, and more than 60 million records in Department of Homeland Security immigration databases. The web site is www.uscis.gov/e-verify.

The information compares date of birth, sex, middle name, social security number and other information. The problem, however, lies in the fact that E-verify cannot determine whether "person" providing the information is in fact the "person identified in documents!"



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12. Wisconsin Fair Employment Act.

Governor Doyle, on June 8, 2009, signed into law allowing circuit courts to award compensatory and punitive damages in cases of employment discrimination, unfair genetic testing, or unfair honesty testing for those employers with 15 or more employees. The law went into effect on July 1, 2009 and is available to those discriminated against on or after this date. Before this statute was passed, monetary damages were limited to back pay, front pay and attorney’s fees. Now, the increased penalties in equal rights discrimination rights cases mirror Title VII compensatory and punitive damages. They are:

- 15 to 100 = \$50,000
- 101 to 200 = \$100,000
- 201 to 500 = \$200,000
- 501+ = \$300,000

Amounts can be adjusted upward to reflect increases in the cost of living.

Also, there is a minor change in the administrative process. If the ALJ finds discrimination, the complainant will be notified that they have 60 days to file an action in the circuit court to recover these compensatory and punitive damages. Punitive damages may be awarded if the complainant shows that the employer acted maliciously or with intentional disregard of the complainant’s rights. These damages are in addition to those awarded by the ALJ. A civil action cannot be brought by the employer.

13. The Employee Free Choice Act.

If passed, this law will have a major impact on businesses throughout the country and in Wisconsin. The reason is because the proposed statute would eliminate an employee’s right to a secret ballot election. Ironically, the reason for the secret ballot in the first place was to protect employees against intimidation and abuse by both employers and union organizers!

Under the current law, if a union obtained “union authorization cards” from 30% of the unit, say for example wait staff, kitchen staff, banquet servers, etc. in a restaurant, the union would file a formal petition with the NLRB. The NLRB would become involved and monitor the activities of both the employer and union pre-election and to hold a secret ballot election.



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The proposed law would eliminate the need for a secret ballot election if union is able to secure over 50% of the "bargaining unit" have having them sign authorization cards. Once the union has a majority of the "unit" signed up, they will go to the NLRB, who must certify the Union as the bargaining representative. The NLRB will not monitor what or how the union was able to secure the union authorization cards.

Problem? This new law would permit Union organizers to unfettered access to your employees through one or more disgruntled employees. Pizza parties and other "get togethers" will be held for your employees to entice (or force) them to sign union authorization cards. Union organizers typically will promise your employees anything they think your employees want to hear and, if that does not work, intimidate them into signing authorization cards. Since there is no NLRB oversight of what the union organizers do or say to employees during the organization process, under the new law, once the employer finds out that the union is trying to organize the workforce, it may be too late.

It gets worse. Once the Union is certified as the bargaining unit representative, the employer must begin negotiation within 10 days of union certification. If an agreement is not reached within 90 days, the union may refer the matter to the FMCS for assistance in negotiations. If an agreement is not achieved within 30 days, the matter will be referred to a "Federal Arbitration Board" who shall render a decision on an agreement, which will be binding on both parties for 2 years. The law further provides "back pay" plus two times that amount as restitution to any employee who was "wrongfully" terminated during the campaign and/or subsequent bargaining and \$20,000 in civil penalties for each violation.

III. Conclusion.

What can you do to minimize risk of employee claims and unionization?
Employers should:

- (1) All employment policies and practices should be included in as Employee Handbook, which should be updated regularly;
- (2) All supervisors must be fully knowledgeable of the policies and practices contained in the Employment Handbook;



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- (3) All supervisors must receive training on the employment laws and their role in minimizing employee related disputes;
- (4) Take any complaint of sexual harassment or improper conduct seriously. Investigate all claims and take reasonable steps to resolve the issue and minimize any reoccurrence;
- (5) When employee is absent carefully determine the cause of the absence and consider the employee's rights that may exist under the Workers Compensation Act (leave, light duty, return to work), FMLA (leave and reinstatement), and disability laws (whether injury has caused a disability, reasonable accommodation, undue hardship);
- (6) Be fair and consistent when supervising the workforce and when implementing discipline. Also, say what you mean and mean what you say.
- (7) To help avoid unions consider:
 - a. Try to identify any employee who is disgruntled and likely to contact a union organizer;
 - b. identify employees who have may be susceptible to manipulation from union organizers or disgruntled employees;
 - c. conduct employee attitude surveys to determine the likes, dislikes and needs of the employee;
 - d. consider creating employee committees to address issues and concerns they may have at work and/or to address general operational issues of the company;
 - e. review and analyze the number of employee related incidents/complaints involving one or more supervisors;
 - f. conduct wage and benefit surveys in your local area to determine where you stand in your market.