

# Top 10 Employment Litigation/ Compliance Risks for 2008

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# Common Management Practices that Lead to Trouble

Some employment litigation is unavoidable because:

1. Few employees are willing to accept the notion that they are poor performers;
2. Other employees see conspiracies behind every employer action;
3. Some employees want to play the litigation lottery;
4. While others are all too willing to exploit their protected characteristics.



## Common Management Practices that Lead to Trouble

- ◆ But some common management practices:
  - ◆ Make litigation more likely;
  - ◆ Make the defense of unavoidable lawsuits more difficult and expensive; and/or
  - ◆ Lead to adverse verdicts or needlessly high settlements.
- ◆ Employers should try to eliminate conduct that leads to unnecessary litigation.



## Top Ten Litigation/Compliance Risks for 2008

- ◆ Agency enforcement and litigation trends indicate the most significant HR-related litigation and enforcements risks have shifted over the years; so
- ◆ Here are our comments regarding the most likely litigation and compliance risks in 2008.



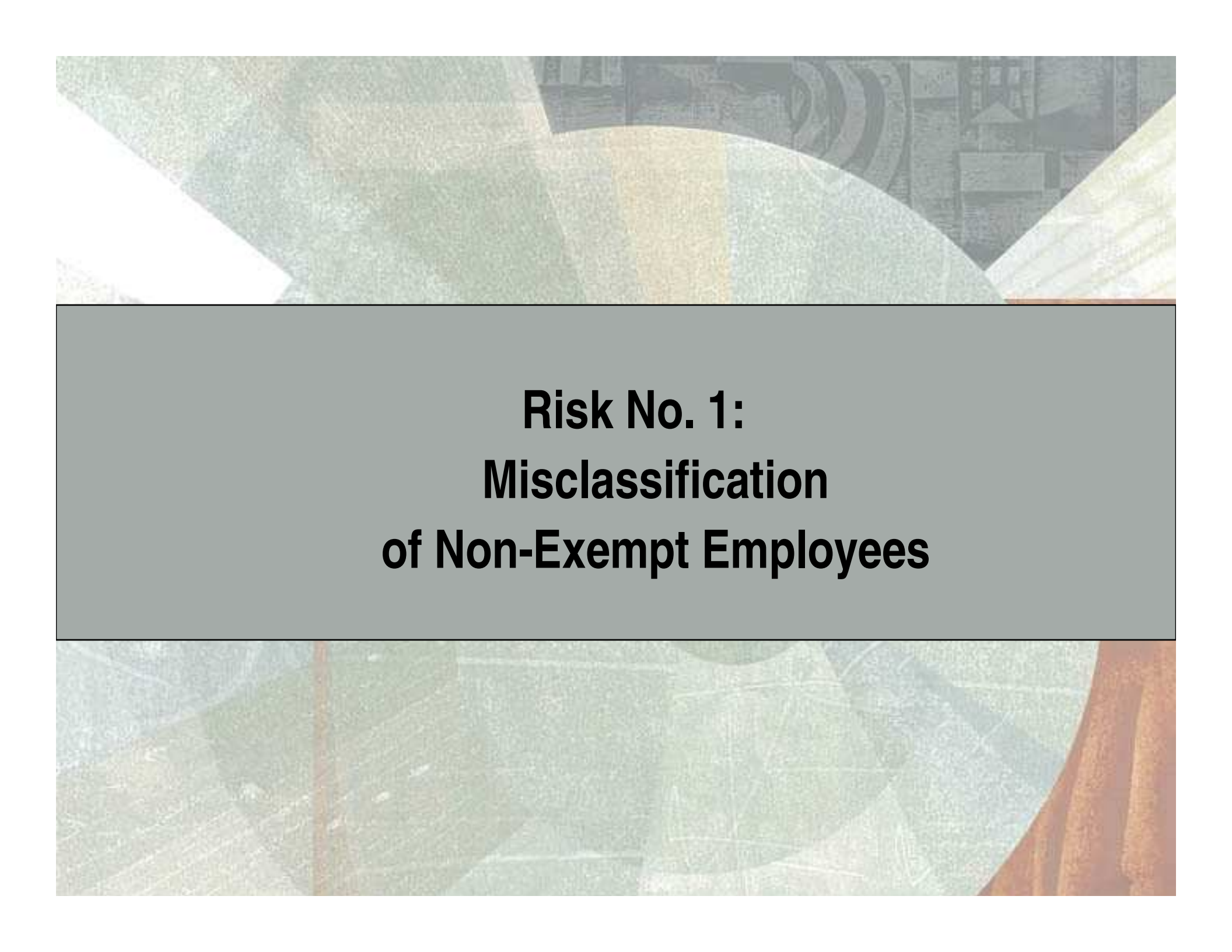
## Top Ten Litigation/Compliance Risks for 2008

1. Misclassification of non-exempt employees.
2. Misclassification of employees as independent contractors.
3. Poor documentation of performance and counseling issues, conduct and concerns.
4. Imprudent internal communications.
5. Spoliation of evidence.
6. Failure to consider the ADA after FMLA rights have expired.
7. Failure to properly engage in and/or properly document engagement in the ADA-mandated *interactive process*.



## Top Ten Litigation/Compliance Risks for 2008

8. Insufficient or results-oriented investigations into complaints of harassment or other employee misconduct.
9. Failure to comply with Internal Revenue Code Section 409A.
10. Failure to properly administer a reduction in force.
11. Failure to comply with USERRA and other laws that the protections accorded veterans and members of the armed forces.



**Risk No. 1:  
Misclassification  
of Non-Exempt Employees**



# Misclassification of Non-Exempt Employees

- ◆ In 2007, rulings in wage and hour disputes outpaced those in both employment discrimination and ERISA.
- ◆ That trend will likely continue in 2008, especially for large employers who may appear to be an appealing target of class action lawsuits.



# Employee Misclassification Litigation Is Big Business!

- ◆ August 2005: Merrill Lynch settles overtime lawsuit with stockbrokers for up to \$37 million
- ◆ March 2006: Morgan Stanley settles overtime lawsuit with financial advisors for \$42.5 million
- ◆ October 2006: Wells Fargo settles overtime lawsuit with business systems consultants for \$12.8 million
- ◆ August 2007: Ball Aerospace and Technologies settles overtime claims for \$1 million
- ◆ November 2007: RadioShack settles overtime lawsuit with store managers for \$9 million



# Misclassification of Non-Exempt Employees

- ◆ To properly classify an employee as exempt from overtime, the employee must meet two sets of requirements:
  1. Duties test – administrative, executive, professional, etc., and
  2. Paid on a salaried basis
  
- ◆ “Salaried employee” does not equal “exempt employee”
  
- ◆ Highly paid sales or technical employees are not exempt if they fail the duties test



## Administrative Exemption — The Rule

- ◆ This exemption available ONLY when:
  - ◆ Salary basis > \$455/week (\$23,660/year)
  - ◆ Primarily performs office/non-manual work directly related to management or general business operations; and
  - ◆ Primary duty includes exercise of discretion and independent judgment in matters of significance.
  
- ◆ Less burdensome MWA pay requirement (\$250/week or \$13,000/year) not likely to matter



## Administrative Exemption — Classification Risks

- ◆ Administrative assistants rarely qualify for this exemption
- ◆ Job title of executive is not material to the analysis
- ◆ Job duties of other employees with same job title not material to the analysis
- ◆ *Discretion and independent judgment in matters of significance* means what it says
- ◆ Don't get cute



## Executive Exemption — The Rule

- ◆ This exemption available ONLY when:
  - ◆ Salary basis > \$455/week (\$23,660/year)
  - ◆ Primary duty is management of business or department
  - ◆ Customarily and regularly supervises 2 or more other full-time employees (or their equivalent)
  - ◆ Employee has authority to hire or fire or employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, etc. given particular weight
- ◆ Less demanding MWA requirement (does not require authority to hire/fire; \$13,000 minimum salary) not likely to matter



## Executive Exemption — Classification Risks

- ◆ Regularly supervises one full-time employee or two part-time employees not sufficient
- ◆ Job titles and/or project and/or budget responsibility not material
- ◆ Be careful in classifying employees who spend a large portion of their time doing work of front-line employees



## Outside Sales Exemption — The Rule

- ◆ This exemption NOT available unless:
  - ◆ Paid on salary or commission basis; and
  - ◆ Primary duties:
    - ◆ Making sales/obtaining contracts for services; and
    - ◆ Work is customarily performed by the employee away from employer's place of business; plus
    - ◆ Office work okay if it supports the employee's own sales



## Outside Sales Exemption—Classification Risks

- ◆ Sales work from employee's home does not count as “away from employer's place of employment”!
- ◆ No more than 20% of time doing non-exempt work.
- ◆ Providing sales support for other employees does not count even if it is sophisticated sales support.



## Inside Sales Exemption

**There is no such thing!**



## Learned Professional Exemption — The Rule

- ◆ This exemption NOT available unless:
  - ◆ Salary basis > \$455/week (\$23,660/year)
  - ◆ Primary duty is performance of work requiring advanced knowledge;
  - ◆ The advanced knowledge must be in a field of science or learning;  
and
  - ◆ The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.




## Learned Professional Exemption — Classification Risks

- ◆ Paralegals: NO WAY
- ◆ Bookkeepers: NO WAY
- ◆ Bookkeepers who are called “Sr. Accountants”: NO WAY
- ◆ Help Desk workers: NOT LIKELY
- ◆ Highly skilled employees doing manual work: NO
- ◆ Lawyers whose only work is document review: NO!



# Properly Determining Salary Basis

- ◆ Paid on a “salary basis” means the employee:
  - ◆ Regularly receives predetermined amount each pay period
  - ◆ Receives full salary for any week in which he/she performs any work
  - ◆ Pay not reduced because of the variations in the quality or quantity of work
  
- ◆ Beware pay practices that may defeat “salary basis”
  - ◆ Partial day deductions from pay
  - ◆ Employee required to work 40+ hours each week
  - ◆ Unpaid suspensions for less than one week (except major safety violations)
  - ◆ Snow day pitfall: reducing pay



**Risk No. 2:  
Misclassifying Employees  
as Independent Contractors**



# Misclassifying Employees As Independent Contractors

- ◆ DOL has identified the misclassification of workers as independent contractors as a top five priority for 2008
- ◆ California is leading the way in targeting employers who misclassify employees, but Washington may not be far behind
- ◆ Different tests for different purposes such as:
  - ◆ income tax withholding
  - ◆ workers comp
  - ◆ employee benefit plan participation



# Tests for Employee/Independent Contractor Status

- ◆ Under each common law and statutory test:
  - ◆ The label used by the parties is immaterial
  - ◆ It is the facts of the relationship, not its name, that matters



## Does Service Recipient Have The Right To Control?

- ◆ A worker is an employee if the purchaser of that worker's service has the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done
- ◆ Control need not actually be exercised in order to create an employment relationship; rather, if the service recipient has the right to control, employment may be shown



## Risks of Misclassification

- ◆ Federal tax liability.
- ◆ Unanticipated liability for on-the-job injury or illness
- ◆ Unanticipated liability for unemployment benefits
- ◆ Unanticipated retirement, stock or group health plan liability (if the plan is not properly drafted to avoid such a result; or if non-discrimination testing issues arise; or if leased employee issues arise)
- ◆ Unanticipated WARN liability
- ◆ Penalties for failure to obtain INS Form I-9



## Don't Use an I/C When You Really Want an Employee

***A company should enter into an independent contractor relationship only when it does not want (or does not feel qualified) to direct or control the service provider.***

or

***A company should direct or control an independent contractor only when it is confident that other factors preclude the existence of an employment relationship.***



# Beware!!

- ◆ Independent contractors and employees doing the same work
- ◆ Independent contractors doing work that is the core of the company's business
- ◆ Exclusive relationships with independent contractors
- ◆ Having employees resign, then rehiring them as independent contractors
- ◆ Furnishing tools, equipment, uniforms to independent contractors



**Risk Nos. 3 and 4:**

**Poor Documentation of  
Employee Performance and Counseling**

**Imprudent Internal Correspondence**



# Document, Document, Document!

- ◆ If you don't make a record of counseling or discipline, your employee may deny it happened—thus giving rise to a material factual dispute
- ◆ Material factual disputes prevent resolution at summary judgment
- ◆ Employees should be informed whenever you put something in their personnel file; otherwise, your credibility may be questioned
- ◆ File notes or disciplinary correspondence should be in plain English and easy to understand; they should be clearly dated and include time, place and relevant facts



## And Document Wisely!

- ◆ Everything you say can and will be used against you in a court of law.
- ◆ Draft performance correspondence for every audience that might read it: employee; other employees; EEOC/WHRC; potential plaintiffs' attorneys; judge and jury.
- ◆ Internal e-mail communications are almost never privileged; in other words: Your “private” conversations with your client managers will be discovered in the event of a lawsuit!



## Good Recordkeeping Practices

- ◆ Be consistent: Always document everything significant; document the same way for each of your employees
- ◆ Be thorough: Write down everything that is or may be important to making your case for discipline or dismissal
- ◆ Be objective: This isn't the place for an emotional rant; you want to demonstrate your cool-headed objectivity; acknowledge the good stuff when appropriate
- ◆ Use plain English: When possible, avoid jargon, use complete sentences



## Good Recordkeeping Practices

- ◆ Be specific: Don't speak in terms of generalities; make the record of specific behaviors, specific dates, witnesses, etc.; no team-building platitudes or other meaningless terms
- ◆ Maintain your focus on the job: No assumptions; no diagnoses; your only interest is getting the work done safely and effectively; no personal or medical advice
- ◆ Be timely: Each day that you delay decreases your credibility with the employee and with the court



## Good Recordkeeping Practices

- ◆ Be honest: Don't pull punches to *be nice*; don't conceal your document-keeping practices; consider giving a copy of all file notes to the affected employees
- ◆ Be prudent: Remember, you are making the record; so don't be hasty or reckless, and don't write things that will be evidence of bad judgment, unlawful prejudices, or bad acts; don't make idle threats; consider consulting with a cooler or wiser head when documenting performance issues
- ◆ Document employee reaction: Disciplinary correspondence should be written **AFTER** you meet with the employee so you can document the employee's reaction; get the employee to sign the document that describes his/her reaction



## Documents for Discussion

- ◆ Discuss the following counseling note:

“Jan, we met today to discuss your many recent absences and late arrivals. Frankly, I don’t know what’s wrong with you lately, you used to be a good employee, but you seem to be a wreck lately. Please go see a doctor and get help for your health problems, which are clearly affecting your work quality and your relationships at work.”



## Documents for Discussion

- ◆ Discuss the following annual review entry:

“Jane, this was an exceptional year for you with many accomplishments, and I am giving you an overall ‘excellent’ review score because of all of your really great contributions and the many appreciative comments we have received from our clients! However, I want to emphasize that you must eliminate the constant friction that you are having with your colleagues. You have got to stop acting like you know better than everyone else, or you will never be successful here in the long run. We need team players.”



## Documents for Discussion

- ◆ Discuss the following final warning:

“Jill, this written warning is intended to put you on notice that we will no longer tolerate your unacceptable disregard for company policies. I have previously met with you on at least six occasions to discuss these company violation issues with you, but you continue to show disrespect for our institution. Because we really value your skill set, I have decided to give you a second final warning, but I will be forced to terminate you if you violate company policy again.”



## Documents for Discussion

- ◆ Discuss the following written warning:

“Jalen, we met this afternoon to discuss your poor attendance. You can see by reviewing the attached attendance log that you have been absent for personal reasons on 4 occasions in the last 30 days. On your most recent absence you failed to provide us with any notice of your absence, thereby creating an unanticipated staff shortage on the floor. You agreed during our meeting today that you would promptly establish and maintain dependable attendance. Your failure to do so may result in your dismissal. Please let me know if there is anything I can do to help you establish and maintain an acceptable dependability record.”



## Documents for Discussion

- ◆ Discuss the following annual review entry:

“James, although you have outstanding clinical skills and patient reviews, your overall review score is “needs improvement” because of two significant issues: First, as documented in the two attached written warnings, you have had two shouting matches with your colleagues. In each case you admitted to me that you initiated the conflict because you believed your colleague was “stupid.” Second, on January 2 and February 18 you failed to make appropriate log entries at the end of your shift, thereby leaving the evening shift without important information about patient issues. Your outstanding clinical skills are of little value to [employer] and its patients unless you can effectively manage these issues each and every day at our facility.”



## Documents for Discussion

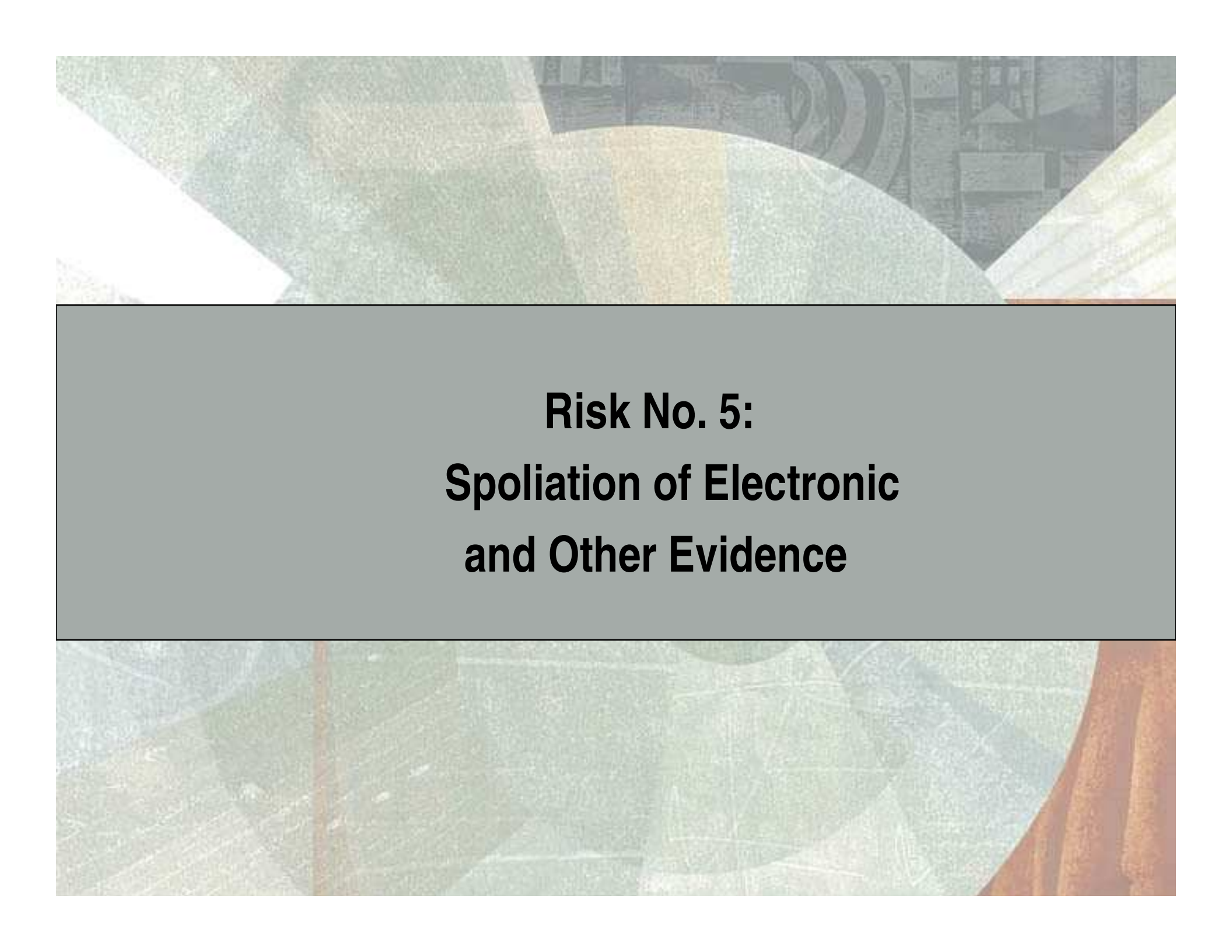
- ◆ Discuss the following e-mail string:

To Joni (HR REP): I've just about had it with this jwrk. He's only been here three days, and he's already messing things up. I'm not going to take this any more. I want him gone tomorrow.

To Jeri (Manager): That's not going to work. I checked his reviews, and they're all good, so you must establish a record of poor job performance.

To Joni: This is nonsense. I can see now that this guy's an idiot, and I've already made my dcsn. Are you telling me I have to pretend I've not made up my mind?

To Jeri: Yes. I understand you've already made the decision to manage him out, but you must take your time. Give him a set of things he must do or not do, and tell him you will fairly consider his performance in making any employment decisions. I'll help you get him out of here.



**Risk No. 5:  
Spoliation of Electronic  
and Other Evidence**



## Parties Must Preserve Evidence Upon Threat of Litigation

- ◆ Parties to litigation must preserve all evidence relating to claims or defenses; this obligation arises when the party reasonably anticipates the likelihood of litigation.
- ◆ Destruction of evidence—even accidental destruction—can subject the party to court-imposed sanctions and can effectively destroy the party's ability to prevail in the litigation.
- ◆ Preservation of evidence is more complex and expensive when data is stored electronically.



# Why Is Electronic Evidence Important?

- ◆ Federal Rules of Civil Procedure have been revised (effective 12/1/06) to address electronic discovery issues
- ◆ State courts won't be far behind
- ◆ Electronic documents are the norm
- ◆ Hefty sanctions (adverse inference) for failing to preserve/produce (Zubulake \$29 million; Morgan Stanley \$1.4 billion)



## Identifying Electronic Discovery Issues Early in the Case

Rule 16: Court may include in initial scheduling order provisions for disclosure and discovery of electronic evidence, including agreements as to how privilege will be handled

Rule 26: Electronic evidence and related issues to be included in initial lay-down disclosures, initial party conference, and discovery plan

Rule 35: Electronic evidence issues to be discussed in initial report of parties' planning meeting



## Electronically Stored Information That Is NOT Reasonably Accessible

- ◆ Rule 26 on discovery limitations
  - ◆ A party need not provide discovery of electronically stored information from sources that the party identifies as *not reasonably accessible because of undue burden or cost*
  - ◆ If other party moves to compel, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost
  - ◆ Court may nonetheless order discovery from such sources if the requesting party shows good cause, subject to specified conditions



## Cost Shifting Example

- ◆ Employment discrimination suit
- ◆ Potentially relevant evidence contained on backup tapes, including email
- ◆ Some of the data was moved from active data to backup tapes after the litigation was reasonably anticipated
- ◆ Who should pay for the expense of restoring and searching the backup tapes?



## Cost Shifting Example (cont.)

- ◆ Applying Zubulake seven-factor cost shifting test, court ruled plaintiff must share 30% of the production costs.  
Quinby v. West LB, 2006 WL 2597900 (S.D.N.Y. Sept. 5, 2006).
- ◆ Producing party does not have an explicit duty to preserve evidence in an accessible format.
- ◆ However, the producing party will bear the expense of producing any evidence preserved in an inaccessible format after litigation is reasonably anticipated.
- ◆ Cost shifting under these circumstances is necessary to “prevent parties from taking unfair advantage of a self-inflicted burden by shifting part of the costs of undoing the burden to an adversary.”



## Sanctions (and a Safe Harbor)

- ◆ Duty to preserve all relevant evidence once litigation is reasonably anticipated.
- ◆ Therefore, a party must protect against routine alteration or destruction of relevant documents until the matter has been fully resolved.
- ◆ Guidance from Zubulake:
  - ◆ When litigation is “reasonably anticipated,” a party must suspend routine document retention and destruction policies and institute a “litigation hold.”
  - ◆ Hold applies to all “accessible” data and (perhaps) to “inaccessible” data of “key players.”<sup>1</sup>

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<sup>1</sup>Zubulake v. UBS Warburg, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Zubulake IV”)



## Counsel's Duty to Ensure Evidence Is Preserved

- ◆ Attorneys may be sanctioned. See Bradley v. Sunbeam Corp., 2003 U.S. Dist. LEXIS 14451, at \*59 (N.D. W. Wa. Aug. 4, 2003) (fining attorney \$100,000)
- ◆ “Sunbeam followed its document retention policy rather than honoring discovery requests and . . . Because of that, products were destroyed or not produced in blind adherence to its policy.”
- ◆ “Drawing on more than 30 years of legal experience, both as a practicing attorney and a magistrate judge, the undersigned believes it is reasonable to assume that Moffett, as a national trial counsel for Sunbeam, bills approximately 2,000 hours, or more, per year at approximately \$250 per hour, or more, for a gross income of \$500,000, or more, per year. This Court believes that 20% of annual gross income is a reasonable sum to punish a lawyer for serious abuse of the rule of law and to deter others from engaging in similar conduct.”




## Counsel's Duty to Ensure Evidence Is Preserved (cont.)

- ◆ “[I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.” Zubulake V.
- ◆ But: “A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the ‘litigation hold’ instruction once and to fully comply with it without the active supervision of counsel.” Id.



## Document Retention: WA Law Reminder

- ◆ Washington has a 3-year statute of limitations on employment discrimination claims
- ◆ Thus, an employer may be required to retain documents for several more years even after the EEOC or WHRC issues a no-cause letter



**Risk No. 6:**  
**Failing to Consider the ADA**  
**After FMLA Rights Have Expired**



## FMLA Leave Exhausted: Now What?

- ◆ True or False?: “Once my employee has exhausted his FMLA leave but has not returned to work, I can terminate his employment . . . or . . . at a minimum, he has lost his right to job protected leave.”
- ◆ Temporary leave held to be reasonable accommodation in every federal judicial circuit. No law yet on how long is too long.
- ◆ Providing 12 weeks of FMLA does may only be the starting point in satisfying an employer’s obligations to accommodate under the ADA or the WLAD.



## Who Is Disabled?

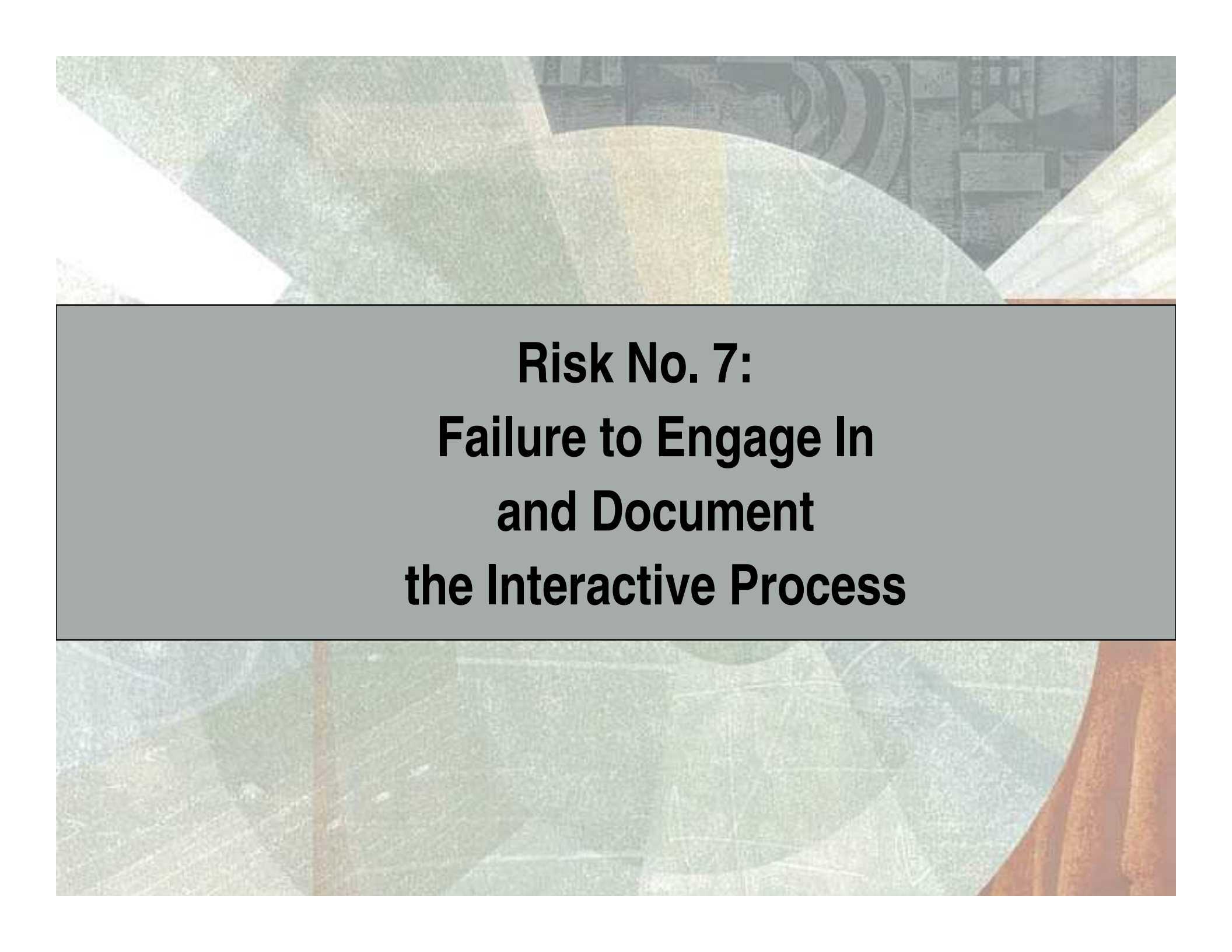
### Under the New WLAD Definition, it Seems We All Are!

- ◆ Under new WLAD definition “**Disability**” now means the presence of a sensory, mental or physical impairment that:
  - ◆ Is medically cognizable or diagnosable; or
  - ◆ Exists as a record or history; or
  - ◆ Is perceived to exist whether or not it exists in fact.
- ◆ Disability includes:
  - ◆ **temporary** or permanent impairments
  - ◆ **mitigated or unmitigated** conditions
- ◆ Exists **whether or not condition limits the ability to work generally or at a particular job**
- ◆ Does not need to substantially limit a major life activity



## Who is Entitled to Accommodation?

- ◆ Impairment must be known or shown through an interactive process to exist in fact and:
  1. Have substantially limiting (not trivial) effect upon individual's ability to
    - (a) perform his or her job,
    - (b) apply or be considered for a job, or
    - (c) have access to equal benefits, privileges, or terms of employment; or
  2. Employer on notice of impairment and medical documentation establishes reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment so would create a substantially limiting (not trivial) effect.



**Risk No. 7:  
Failure to Engage In  
and Document  
the Interactive Process**



## Failure to Engage in and Document the Interactive Process

- ◆ Every mental or physical limitation—whether work related or non-work related—is *potentially* a disability under the ADA or WLAD.
- ◆ Few managers or supervisors know anything about the ADA or Washington disability law—and they don't need to know it all—but they *must* know to call HR if any employee asks for relief from part of their job due to a mental or physical limitation.
- ◆ An employer that fails to start the interactive process when required by the circumstances increases its exposure to disability litigation and makes it more difficult to manage a disability lawsuit.



## Failure to Engage in and Document the Interactive Process

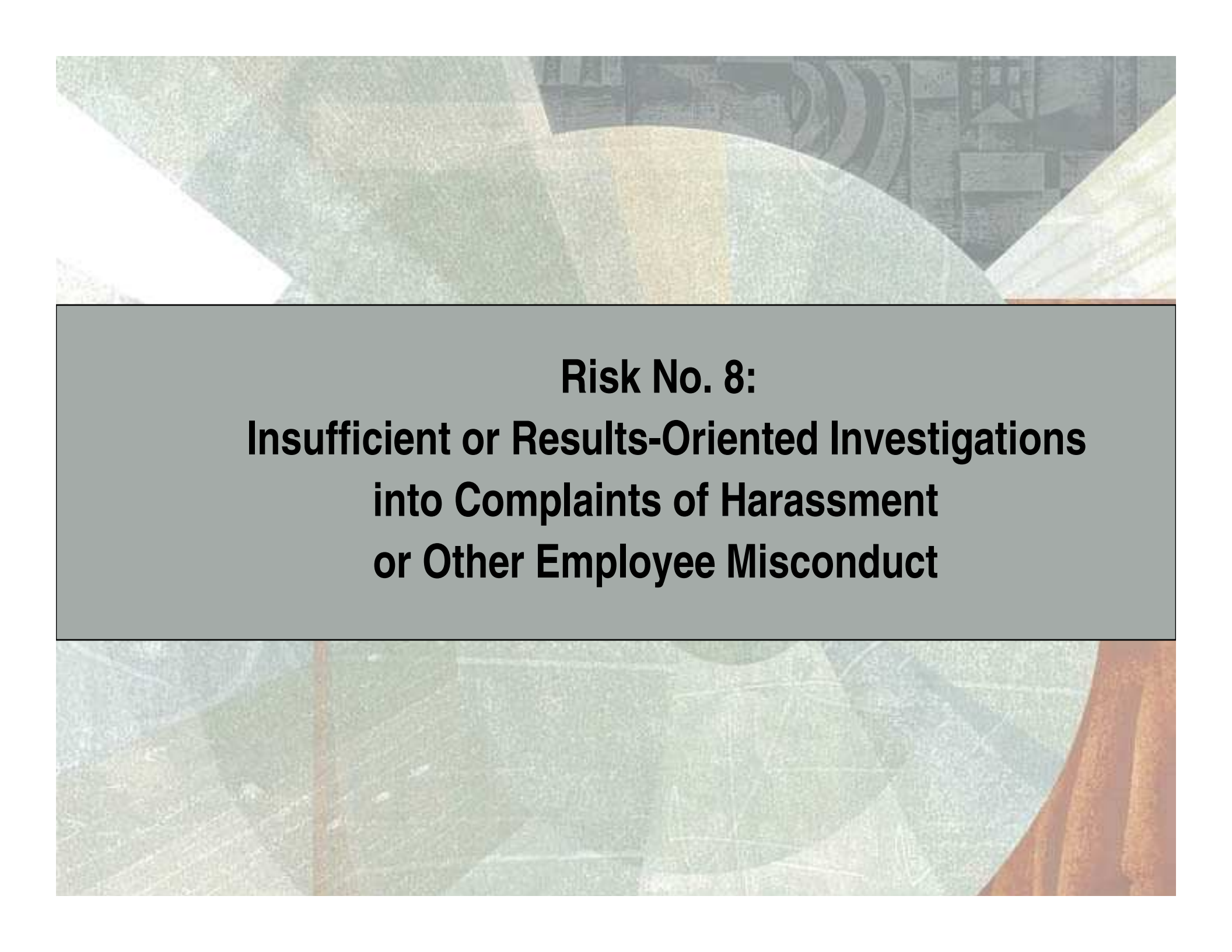
- ◆ Just as discipline should be documented, so should the interactive process.
- ◆ Documentation should identify:
  - ◆ The physical or mental limitations at issue (but only the limitations, not the underlying condition);
  - ◆ Job modifications or other accommodations requested;
  - ◆ Other jobs to be considered as reasonable accommodations.
- ◆ Keep the focus on work, and the employee's ability to do the work, with or without accommodation.



## Accommodation Note for Discussion

- ◆ Consider the following accommodation message:

“Julie: I am sorry to hear about your medical condition, but thank you for the information. Of course we will provide you with some time off from work, but only for a reasonable time. You already took off 3 months of FMLA, and we can provide you with some more time off, but we are kind of running out of time given the burden your leave is placing on other people. I’ve talked with your manager, who says he doesn’t think it’s reasonable to give you more than about 6 months off, because he’s got overtime costs to consider. So I need to hear from you pretty quickly with confirmation that you can come back ready for work by August 1. Please let me know as soon as possible.”



**Risk No. 8:  
Insufficient or Results-Oriented Investigations  
into Complaints of Harassment  
or Other Employee Misconduct**



## Insufficient or Results-Oriented Investigations

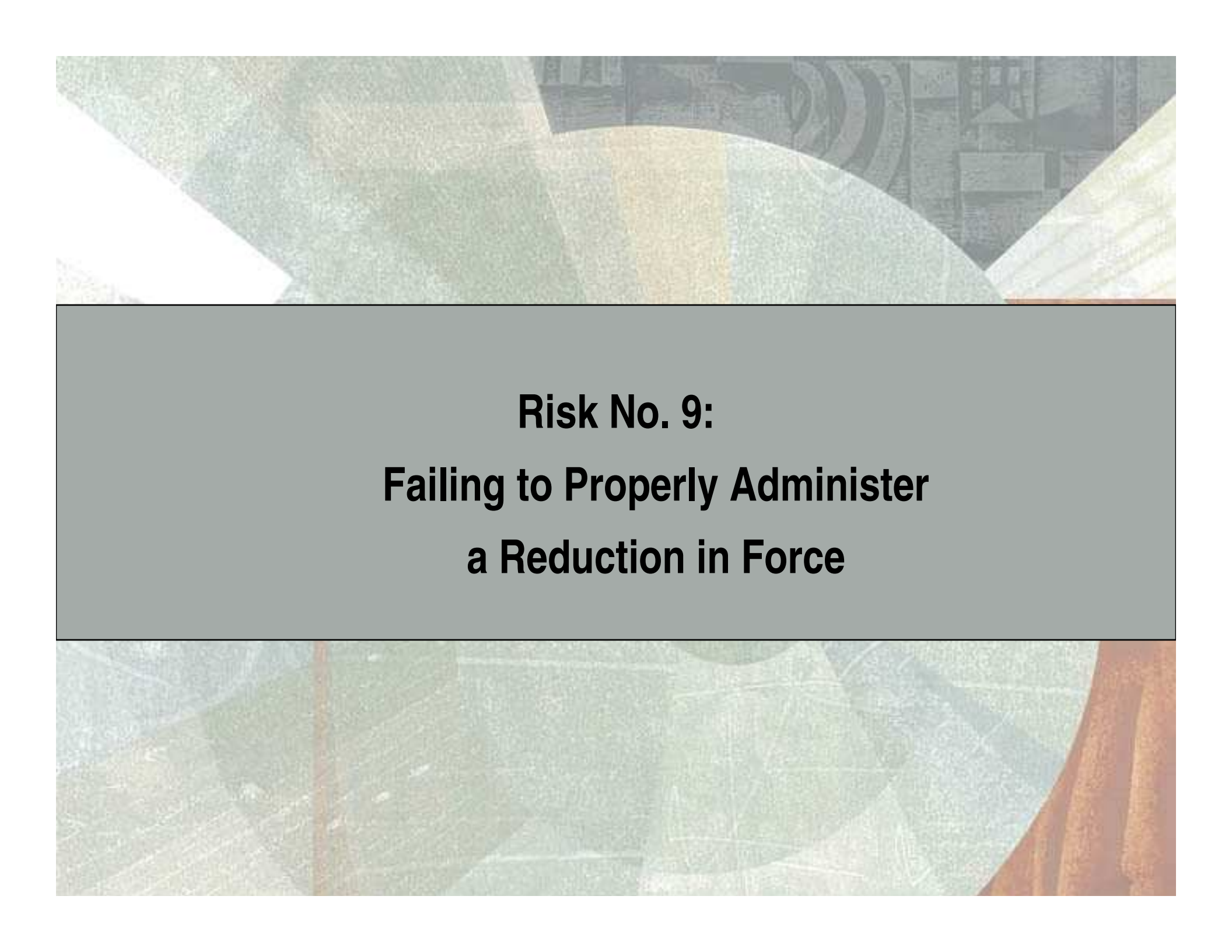
- ◆ Complaints from *bad employees about good employees* must be treated with the same respect as those from *good employees about bad employees*.
- ◆ The depth or quality of investigations into complaints should not be influenced by preconceived notions about alleged victims or alleged perpetrators.
- ◆ If an employee sues for harassment, HR and management will be judged on the quality of their investigation.
- ◆ Incomplete or biased investigations will be used as evidence that the employer does not care about workplace harassment or behavior.



## Insufficient or Results-Oriented Investigations

### Examples:

- ◆ Employee on third final warning complains of sexual harassment by manager; HR manager “knows” this is utter nonsense; no investigation conducted or documented.
- ◆ Many complaints received about long-time employee; new manager knows the long-time employee has a reputation for being abrasive and arbitrary; new manager assumes new complaints are valid without conducting any investigation.
- ◆ Brash employee complaints of sexual harassment by other employee; no investigation because “everybody knows.”



**Risk No. 9:  
Failing to Properly Administer  
a Reduction in Force**



## Reduction In Force Risks

- ◆ Employers should resist the temptation to use RIFs as an opportunity to abandon prudent HR practices.
- ◆ Downsizing is not necessarily a blank check to get rid of “problem” employees.
- ◆ Rational and defensible and non-discriminatory criteria should be developed before any employee is selected for layoff.
- ◆ Criteria should be rigorously applied to select employees for layoffs.
- ◆ Don't prevaricate!



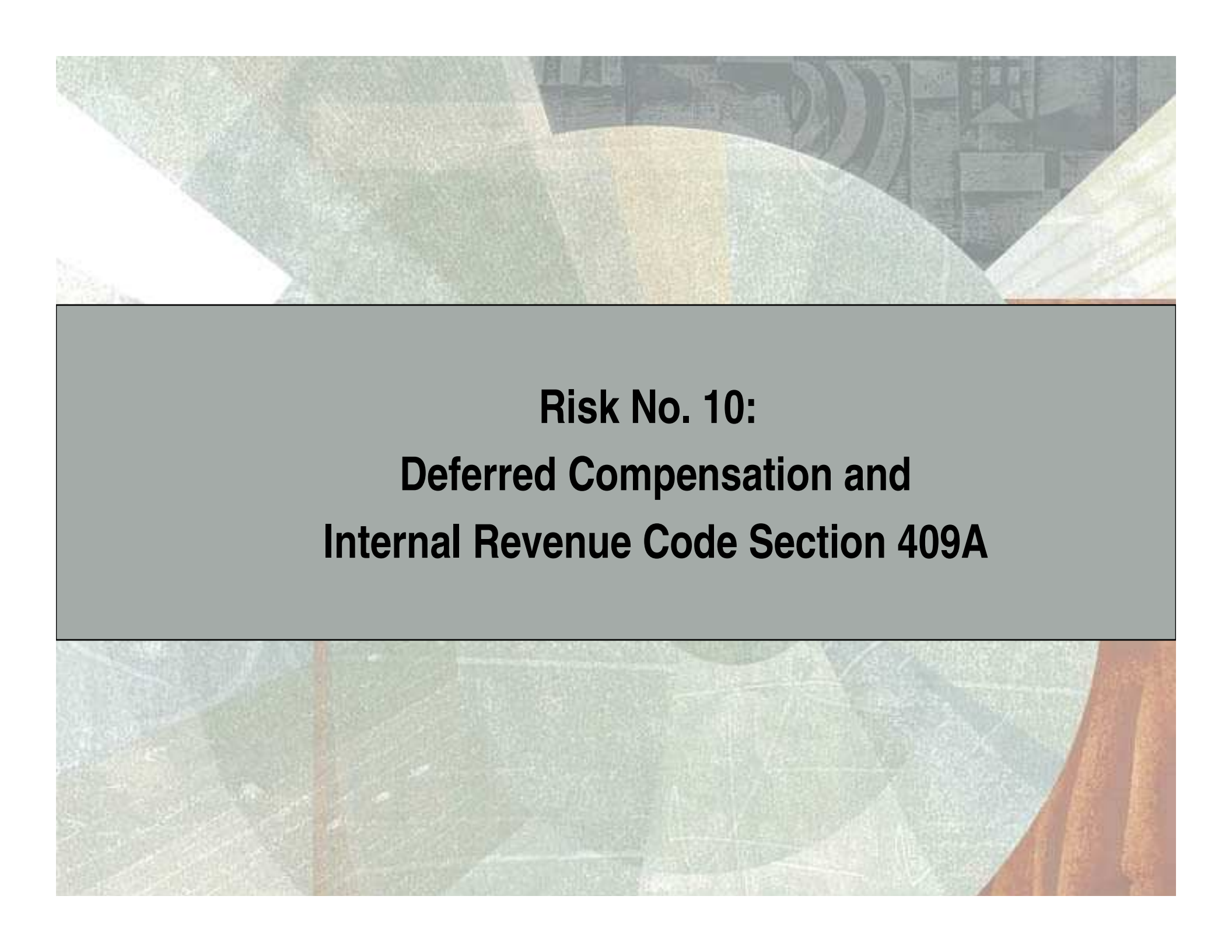
## Reduction In Force Risks

- ◆ If a significant number of employees are being adversely affected by a RIF, an adverse impact analysis of the effect of the selection process on certain groups:
  - ◆ Is probably a good idea;
  - ◆ Is probably required by the ADEA if severance packages are being provided in exchange for a release of claims.
- ◆ So confer with an attorney before you act!



# WARN Act Compliance

- ◆ Employers who have 100 or more employees
- ◆ 60 days notice before either plant closing or mass layoff to:
  - ◆ *Affected workers*
  - ◆ *Worker representatives (i.e., unions)*
  - ◆ *Local government unit*
- ◆ Plant closing:
  - ◆ Employment site will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period
- ◆ Mass Layoff
  - ◆ Layoff will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce



**Risk No. 10:  
Deferred Compensation and  
Internal Revenue Code Section 409A**



## Deferred Compensation and Code Section 409A

- ◆ Code Section 409A:
  - ◆ If a nonqualified deferred compensation plan fails to meet specified requirements, all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income.
  - ◆ In any case where income is includible in gross income as provided for above, such amounts will also be subject to a 20% excise tax and interest on late payment of taxes.



## Deferred Compensation and Code Section 409A

- ◆ In 2007 the Service published 400 pages of regulations describing the application of Code Section 409A
- ◆ Bottom line: 409A applies to every arrangement that may defer the receipt of compensation to a year after the year in which an employee obtained a contractual right to that compensation.  
For example:
  - ◆ SERPS
  - ◆ Equity compensation plans
  - ◆ Bonus and other incentive plans
  - ◆ Severance plans
  - ◆ Employment
  - ◆ Post-employment reimbursement agreements
  - ◆ Tax gross-up payments
  - ◆ PTO plans (with discretionary cashout provision)



## Deferred Compensation and Code Section 409A

- ◆ If you have any plan or arrangement in which an employee either (a) will not receive until some time in the future a payment to which he/she has a contractual right today; or (b) may have some ability to control the timing of the receipt of some economic benefit:
  - ◆ You may have a Section 409A plan on your hands
  - ◆ You may need to make sure this plan complies with the requirements of 409A which, at a minimum:
    - ◆ Prohibit accelerated distribution of those amounts except in certain circumstances
    - ◆ Prohibit further deferral of the receipt of such amounts except in certain circumstances



**Bonus Risk:  
Failure to Comply with USERRA  
and Other Laws Protecting Veterans**



# Protections for Members and Former Members of the Armed Forces

- ◆ Vets will be returning to the work force in greater numbers
- ◆ New administration in January '09 may increase that return
- ◆ Many new laws enacted to protect both vets and their families
- ◆ Laws protect those who are involuntarily called to duty *and* those who voluntarily join the services



# Uniformed Services Employment and Reemployment Act

- ◆ Reemployment rights:
  - ◆ Covers employees who have missed up to five years (or maybe more) of work due to service in the armed forces.
  - ◆ Requires employees to give advanced notice of leave *if possible*.
  - ◆ Requires employees to timely return to work after completion of service; additional time off required in certain circumstances.
  - ◆ Employee must be restored to the job and benefits employee would have attained if employee had not been absent due to military service or, in some cases, a comparable job.
  - ◆ Presumption is right-to-return; employer must generally take back the employee and then (when appropriate) prove the employee is not entitled to return.



## USERRA (cont.)

- ◆ Health Benefits:
  - ◆ If employee leaves to perform military service, employee has the right to elect to continue employee's existing employer-based health plan coverage for employee and employee's dependents for up to 24 months while in the military.
  - ◆ Even if the employee does not elect to continue coverage during military service, employee has the right to be reinstated in his or her employer's health plan when employee is are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.



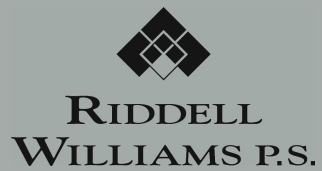
## USERRA (cont.)

- ◆ Enforcement:
  - ◆ U.S. Department of Labor, Veterans' Employment and Training Service (VETS) is authorized to investigate.
  - ◆ There is also a private right of action under USERRA.
- ◆ Confer with counsel before you do anything to adversely affect a veteran who wants to take leave or return to work.



## Other Veterans Rights

- ◆ WLAD: Honorably discharged military status added as a protected category under WLAD in 2007
- ◆ FMLA leave expanded in January 2008:
  - ◆ Leave extended to 26 weeks of leave for family members caring for U.S. service members injured while on active duty.
  - ◆ Up to 12 weeks of leave for "any qualifying exigency" to family members of service members (including reservists) called to active duty. Qualifying exigency was not defined, but may be for non-medical reasons. DOL will probably issue clarifying regulations in the future.



# Questions?

Please contact us any time with additional questions.

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