# LIST OF CHAPTERS

# **VOLUME 1**

#### **Chapter 1 EMPLOYMENT AT WILL**

Joan M. Bechtold, Esq. Barry D. Roseman, Esq. K. Preston Oade, Jr., Esq. David D. Powell, Jr., Esq.

#### Chapter 2 CONTRACT AND PROMISSORY ESTOPPEL CLAIMS

Joan M. Bechtold, Esq. Barry D. Roseman, Esq. K. Preston Oade, Jr., Esq. David D. Powell, Jr., Esq.

#### Chapter 3 TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Thomas J. Arckey, Esq. Susan P. Klopman, Esq.

# Chapter 4 THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Sarah R. Wisor, Esq. Sarah J. Parady, Esq.

### Chapter 5 FEDERAL LAWS ADDRESSING DISCRIMINATION IN EMPLOYMENT

BASED ON DISABILITY Ariel Beryl DeFazio, Esq. Danielle L. Kitson, Esq.

# Chapter 6 THE FAMILY AND MEDICAL LEAVE ACT

Hollie L. Wieland, Esq. Veronica T. von Grabow, Esq.

# Chapter 7 THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

Jeff Joseph, Esq.

# **Chapter 8** FEDERAL LABOR STATUTES

Richard Rosenblatt, Esq.

#### Chapter 9 RESERVED

#### Chapter 10 THE COLORADO ANTI-DISCRIMINATION ACT

Gillian McKean Bidgood, Esq. Qusair Mohamedbhai, Esq.

#### **Chapter 11 PROTECTED ACTIVITIES**

Patricia S. Bangert, Esq.

# Chapter 12 TORT CLAIMS FOR WRONGFUL DISCHARGE AGAINST

**PUBLIC POLICY** 

Stephen M. DeHoff, Esq.

#### **Chapter 13 DEFAMATION**

Sean R. Gallagher, Esq. Jon J. Olafson, Esq.

#### Chapter 14 WORKPLACE PRIVACY

John A. Culver, Esq.

# **Chapter 15 INTERFERENCE WITH CONTRACT**

Michael C. Santo, Esq. Alicia Williams Severn, Esq.

# Chapter 16 NEGLIGENT AND INTENTIONAL INFLICTION OF

**EMOTIONAL DISTRESS** 

Kaitlin Fox Hinkle, Esq.

# **Chapter 17 MISCELLANEOUS TORTS**

Thomas J. Arckey, Esq. Steven M. Gutierrez, Esq.

# **Chapter 18 COMMON LAW DUTIES OF EMPLOYERS AND EMPLOYEES**

Jessica Brown, Esq.

### **Chapter 19 NONCOMPETITION AGREEMENTS AND TRADE SECRET PROTECTION**

Jay S. Jester, Esq.

Christopher H. Toll, Esq.

#### Chapter 20 WAGE, HOUR, AND BENEFITS ISSUES

Andrew H. Turner, Esq. Jan A. Steinhour, Esq.

# Chapter 21 REPRESENTING CLAIMANTS AND EMPLOYERS IN COLORADO

**UNEMPLOYMENT HEARINGS** 

William E. Benjamin, Esq. Mark E. Parcheta, Esq.

TOC-2 (1/18)

#### **Chapter 22 PUBLIC EMPLOYERS AND EMPLOYEES**

Seth J. Benezra, Esq. William T. O'Connell, III, Esq. Adam W. Ray, Esq.

# Chapter 23 THE FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY PROCESS

C. Jaye Mills, Esq. Rhonda Rhodes, Esq. Marisa L. Williams, Esq.

#### **Chapter 24** THE COLORADO STATE PERSONNEL SYSTEM

Dana Shea-Reid, Director, State Personnel Board Susan J. Tyburski, Administrative Law Judge Keith A. Shandalow, Administrative Law Judge Frederick "Rick" Dindinger II, Administrative Law Judge

# Chapter 25 WORKERS' COMPENSATION AND DISABILITY ISSUES

Patricia Jean Clisham, Esq. Larry R. Martinez, Esq. Michael J. Belo, Esq.

# **VOLUME 2**

#### Chapter 26 WORKPLACE VIOLENCE

Laura J. Hazen, Esq.

#### Chapter 27 PREVENTATIVE MAINTENANCE FOR EMPLOYERS

Gretchen E. Lipman, Esq.

### **Chapter 28** LITIGATION OF EMPLOYMENT CASES

Robert J. Truhlar, Esq. David H. Stacy, Esq. F.J. "Rick" Dindinger II, Esq. Catherine N. Peterson, Esq.

#### Chapter 29 DISCOVERY

Sean R. Gallagher, Esq. Jon J. Olafson, Esq.

#### Chapter 30 SETTLEMENT AND MEDIATION

Kathryn E. Miller, Esq. Charlotte N. Sweeney, Esq.

# **Chapter 31 WORKPLACE INVESTIGATIONS**

Elizabeth R. Rita, Esq. Jessica Brown, Esq.

# **Chapter 32 ARBITRATION**

Todd J. McNamara, Esq. Mathew Shechter, Esq. Christine A. Samsel, Esq. Hannah M. Caplan, Esq.

# **Chapter 33** ETHICS AND PROFESSIONALISM ISSUES IN

**EMPLOYMENT LAW CASES** 

Kathryn E. Miller, Esq. Gary Clexton, Esq.

**APPENDICES** 

**TABLE OF CASES** 

**SUBJECT INDEX** 

TOC-4 (1/18)

# TABLE OF CONTENTS

# **VOLUME 1**

Chapter 1	EMPLOYMENT AT WILL		
	§ 1.1	WHAT IS EMPLOYMENT AT WILL?	
	§ 1.2	ORIGINS AND HISTORY	
		§ 1.2.1—Origins § 1.2.2—Gradual Erosion Of The Doctrine § 1.2.3—Exceptions	
	§ 1.3	CHECKLIST OF POSSIBLE LEGAL CLAIMS IN EMPLOYMENT CASES	
Chapter 2	CONT	RACT AND PROMISSORY ESTOPPEL CLAIMS	
	§ 2.1	EXPRESS CONTRACTS	
	§ 2.2	<ul> <li>§ 2.1.1—Contracts For A Specific Term</li> <li>§ 2.1.2—Breach Of Contract To Pay Compensation Or To Provide Work</li> <li>§ 2.1.3—Oral Agreements</li> <li>§ 2.1.4—Contracts For Permanent Employment</li> <li>§ 2.1.5—Due-Process Claims For Public Employees</li> <li>§ 2.1.6—Arbitration</li> <li>§ 2.1.7—Other Issues</li> <li>§ 2.1.8—General Principles Of Construction</li> <li>GOOD FAITH AND FAIR DEALING</li> <li>§ 2.2.1—Express Covenant Of Good Faith And Fair Dealing</li> <li>§ 2.2.2—Implied Covenant Of Good Faith And Fair Dealing</li> </ul>	
	§ 2.3	IMPLIED CONTRACTS	
		<ul> <li>§ 2.3.1—What Is Covered</li> <li>§ 2.3.2—Disclaimers</li> <li>§ 2.3.3—Knowledge Of And Reliance Upon Employer Practices</li> </ul>	

#### § 2.4 PROMISSORY ESTOPPEL

- § 2.4.1—Historical Background
- § 2.4.2—Status Of Doctrine Today
- § 2.4.3—Claims Against Governmental Entities
- § 2.4.4—Some Distinctions Between Promissory Estoppel And Breach Of Contract Claims
- § 2.4.5—Effect Of Disclaimers

#### § 2.5 DEFENSES

- § 2.5.1—Statute Of Frauds
- § 2.5.2—Statutes Of Limitations
- § 2.5.3—Specificity And Definiteness
- § 2.5.4—The After-Acquired Evidence Doctrine
- § 2.5.5—Duty To Mitigate
- § 2.5.6—Employer's Unconditional Offer Of Reinstatement
- § 2.5.7—Preemption
- § 2.5.8—Internal Grievance Procedures And Appeal Boards

# § 2.6 REMEDIES

- § 2.6.1—Available Damages
- § 2.6.2—Limitations On Available Damages
- § 2.6.3—Prejudgment Interest
- § 2.6.4—Postjudgment Interest

#### Chapter 3 TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

#### § 3.1 INTRODUCTION

- § 3.1.1—Title VII Of The Civil Rights Act Of 1964
- § 3.1.2—The Civil Rights Act Of 1991

#### § 3.2 REQUIREMENTS FOR ENFORCEMENT OF TITLE VII

- § 3.2.1—Employers Covered By Title VII
- § 3.2.2—Protections Provided By Title VII

### § 3.3 REQUIREMENTS OF FILING A CHARGE OF DISCRIMINATION

- § 3.3.1—The Filing Period Requirements
- § 3.3.2—Discrete Acts
- § 3.3.3—Hostile Work Environment Claims
- § 3.3.4—Ledbetter Fair Pay Act Amendments To Title VII

TOC-6 (1/18)

- § 3.3.5—90-Day Limit To File Suit
- § 3.3.6—Filing Of A Charge

# § 3.4 PROOF OF A TITLE VII VIOLATION

- § 3.4.1—Burdens Of Proof And The *Prima Facie* Case
- § 3.4.2—McDonnell Douglas Burden-Shifting Analysis
- § 3.4.3—Proving Pretext
- § 3.4.4—Disparate Impact
- § 3.4.5—Mixed-Motive Analysis
- § 3.4.6—Direct Evidence To Prove Discrimination
- § 3.4.7—Pattern And Practice To Prove Discrimination

### § 3.5 SPECIFIC CATEGORIES OF TITLE VII CLAIMS

- § 3.5.1—Sex Discrimination
- § 3.5.2—Race Discrimination
- § 3.5.3—National Origin Discrimination
- § 3.5.4—Religious Discrimination
- § 3.5.5—Retaliation
- § 3.5.6—42 U.S.C. § 1981

#### § 3.6 DEFENSES TO TITLE VII CLAIMS

- § 3.6.1—Nondiscriminatory Conduct Defense
- § 3.6.2—Faragher/Ellerth Affirmative Defense
- § 3.6.3—Failure To State A Claim Defense
- § 3.6.4—Bona Fide Occupational Qualification Defense
- § 3.6.5—After-Acquired Evidence Defense
- § 3.6.6—Other Defenses Based On Statutory Exception
- § 3.6.7—Failure To Complain About Harassment
- § 3.6.8—Adequate Response
- § 3.6.9—Failure To Exhaust Administrative Remedies
- § 3.6.10—Same Actor/Supervisor Defense
- § 3.6.11—Unconditional Offer

# § 3.7 REMEDIES FOR VIOLATION OF TITLE VII

- § 3.7.1—Reinstatement
- § 3.7.2—Back Pay
- § 3.7.3—Front Pay
- § 3.7.4—Injunctive Relief
- § 3.7.5—Compensatory Damages
- § 3.7.6—Punitive Damages
- § 3.7.7—Attorney Fees And Costs

# Chapter 4 THE AGE DISCRIMINATION IN EMPLOYMENT ACT § 4.1 **IN GENERAL** § 4.1.1—What Employers Are Covered By The ADEA? § 4.1.2—What Individuals Are Covered By The ADEA? § 4.1.3—Geographical Coverage § 4.2 PROHIBITED CONDUCT AND PROOF OF SAME § 4.2.1—Disparate Treatment Claims § 4.2.2—Pattern And Practice Claims § 4.2.3—Disparate Impact Claims **DEFENSES** § 4.3 § 4.3.1—Administrative Exhaustion § 4.3.2—Bona Fide Occupational Qualifications § 4.3.3—Bona Fide Employee Benefit Plans And Seniority Systems § 4.3.4—Reasonable Factors Other Than Age § 4.3.5—Same Supervisor § 4.3.6—Waiver § 4.3.7—Faragher/Ellerth § 4.3.8—Portal-to-Portal Act **§ 4.4** REMEDIES FOR VIOLATION OF THE ADEA § 4.5 **ADMINISTRATIVE PREREQUISITES** Chapter 5 FEDERAL LAWS ADDRESSING DISCRIMINATION IN EMPLOYMENT **BASED ON DISABILITY** § 5.1 **BACKGROUND** § 5.1.1—The ADA Amendments Act Of 2008 (ADAAA) § 5.2 WHAT EMPLOYERS ARE COVERED BY THE ADA AND §§ 501 **AND 504?** § 5.3 WHAT ARE THE ELEMENTS OF A PRIMA FACIE CASE?

TOC-8 (1/18)

# § 5.4 WHAT IS A "DISABILITY" UNDER THE ADA AND THE REHABILITATION ACT?

- § 5.4.1—Physical Or Mental Impairment That Substantially Limits A Major Life Activity
- § 5.4.2—A Record Of A Physical Or Mental Impairment That Substantially Limits A Major Life Activity
- § 5.4.3—Being Regarded As Having A Physical Or Mental Impairment That Substantially Limits A Major Life Activity

# § 5.5 WHO IS A "QUALIFIED" INDIVIDUAL WITH A DISABILITY?

- § 5.5.1—Essential Functions Of A Job
- § 5.5.2—Reasonable Accommodations
- § 5.5.3—Accommodation Of Medical Marijuana Or Adverse Action Based On Use Of Medical Marijuana
- § 5.5.4—Suffered An Adverse Employment Action Based On Disability
- § 5.5.5—Exceptions To The Definitions Of "Disability" And "Qualified Individual With A Disability"

#### § 5.6 WHAT TYPES OF DISCRIMINATION ARE PROHIBITED?

- § 5.6.1—Discriminatory Limitation, Segregation, Or Classification
- § 5.6.2—Arrangements That Result In Discrimination
- § 5.6.3—Discriminatory Standards, Criteria, Or Methods Of Administration
- § 5.6.4—Discrimination Based On Relationship With A Disabled Person (Association Discrimination)
- § 5.6.5—Failing To Make Reasonable Accommodations
- § 5.6.6—Discriminatory Qualification Standards, Employment Tests, Or Other Selection Criteria
- § 5.6.7—Discriminatory Selection And Administration Of Employment Tests
- § 5.6.8—Hostile Work Environment

# § 5.7 ARE MEDICAL EXAMINATIONS AND INQUIRIES PERMITTED?

# § 5.8 ARE CHARGING PARTIES PROTECTED FROM RETALIATION?

#### § 5.9 WHAT DEFENSES ARE AVAILABLE?

- § 5.9.1—Job Relatedness/Business Necessity
- § 5.9.2—Direct Threat
- § 5.9.3—Undue Hardship
- § 5.9.4—Religious Organizations

#### § 5.10 WHAT REMEDIES ARE AVAILABLE?

#### § 5.11 OTHER ISSUES

- § 5.11.1—Constitutionality Of The ADA As Applied To States
- § 5.11.2—Relationship Of Social Security And Other Disability Claims To A Claim Of Disability Discrimination Under The ADA
- § 5.11.3—Alleging A Class Action Under The ADA
- § 5.11.4—Administrative Prerequisites To ADA Actions

# Chapter 6 THE FAMILY AND MEDICAL LEAVE ACT

#### § 6.1 IN GENERAL

- § 6.1.1—Veterans, Exigency Leave For Military Members And Airline Flight Crew Employees
- § 6.2 WHAT EMPLOYERS ARE COVERED BY THE FMLA?
- § 6.3 WHAT EMPLOYEES ARE ELIGIBLE FOR LEAVE?
- § 6.4 LEAVE FOR THE BIRTH, ADOPTION, OR PLACEMENT INTO A FOSTER HOME OF A CHILD
- § 6.5 WHAT IS A QUALIFYING SERIOUS HEALTH CONDITION?
- § 6.6 WHO IS A SON, DAUGHTER, SPOUSE, PARENT, OR NEXT OF KIN OF A COVERED SERVICE MEMBER?
- § 6.7 WHO IS A HEALTH CARE PROVIDER?
- § 6.8 LEAVE
  - § 6.8.1—Substitution Of Paid Leave For Unpaid Leave Provided By FMLA
  - § 6.8.2—Intermittent Leave
  - § 6.8.3—Transfer Of Employee To An Alternative Position During Intermittent Leave Or Reduced Scheduled Leave
  - § 6.8.4—Voluntary Employment In A Light Duty Position Does Not Count Against FMLA Leave
  - § 6.8.5—Leave For Qualifying Exigency Of Servicemember
  - § 6.8.6—Military Caregiver Leave
  - § 6.8.7—Bereavement Leave
  - § 6.8.8—Do Holidays Or Workplace Closures Count As FMLA Leave?

# § 6.9 EMPLOYEE'S NOTICE REQUIREMENTS

TOC-10 (1/18)

	§ 6.10	EMPLOYER'S NOTICE REQUIREMENTS
		§ 6.10.1—FMLA Forms § 6.10.2—General Notice § 6.10.3—Eligibility Notice § 6.10.4—Rights And Responsibilities Notice § 6.10.5—Designation Notice § 6.10.6—Consequences For Failure To Provide Required Notices
	§ 6.11	EMPLOYER'S RECORD-KEEPING REQUIREMENTS
	§ 6.12	REINSTATEMENT TO FORMER OR EQUIVALENT POSITION
	§ 6.13	BENEFIT CONTINUATION
	§ 6.14	EXEMPTIONS FOR KEY EMPLOYEES
	§ 6.15	CERTIFICATION REQUIREMENTS
	§ 6.16	FMLA PROHIBITS INTERFERENCE, RETALIATION, OR DISCRIMINATION
		§ 6.16.1—Claims Of Interference § 6.16.2—Claims Of Discrimination Or Retaliation
	§ 6.17	REMEDIES FOR VIOLATIONS OF THE FMLA
	§ 6.18	WHO MAY BE LIABLE FOR VIOLATIONS?
	§ 6.19	STATES' IMMUNITY FROM CIVIL SUIT
	§ 6.20	FMLA ACCRUAL FOR UNIFORMED SERVICE MEMBERS
	§ 6.21	USEFUL RESOURCES
Chapter 7	THE IN	AMIGRATION REFORM AND CONTROL ACT OF 1986
	§ 7.1	INTRODUCTION
	§ 7.2	EMPLOYMENT ELIGIBILITY VERIFICATION
		§ 7.2.1—Using Form I-9 § 7.2.2—NLRB Issues § 7.2.3—Penalties For Knowingly Hiring Or Continuing To Employ An Unauthorized Worker

- § 7.2.4—Penalties For I-9 Errors Or "Paperwork" Violations
- § 7.2.5—Enforcement
- § 7.2.6—Constructive Knowledge, Document Fraud Liability
- § 7.2.7—Defenses To Employer-Sanctions Charges
- § 7.2.8—Mitigation Of Fines
- § 7.2.9—Procedures After ICE Inspection Notice Of Intent To Fine, Notice Of Suspect Documents, Settlement, Complaint, OCAHO Proceedings, Tenth Circuit Appeal

#### § 7.3 DISCRIMINATION IN EMPLOYMENT VERIFICATION

- § 7.3.1—Unfair Immigration-Related Employment Practices (UIREPs)
- § 7.3.2—Procedure For Enforcement Of UIREPs
- § 7.3.3—Burdens Of Production

#### **EXHIBITS**

- Exhibit 7A—Form I-9, Employment Eligibility Verification
- Exhibit 7B—Annotated Mockup Of I-9 Violations
- Exhibit 7C—Colorado's Immigration Status Verification Requirements On Employers

# **Chapter 8** FEDERAL LABOR STATUTES

#### § 8.1 THE LABOR-MANAGEMENT RELATIONS ACT

- § 8.1.1—National Labor Relations Act Section 7, Private Sector Employee Rights
- § 8.1.2—National Labor Relations Act Section 9, Representation By A Union
- § 8.1.3—National Labor Relations Act Section 8, Unfair Labor Practices
- § 8.1.4—Enforcement Of Unfair Labor Practice Charges

#### Chapter 9 RESERVED

### Chapter 10 THE COLORADO ANTI-DISCRIMINATION ACT

#### § 10.1 GENERAL PROVISIONS

- § 10.1.1—Overview
- § 10.1.2—Remedies Under CADA
- § 10.1.3—Relationship To Federal Law And State Common Law
- § 10.1.4—Who Is Subject To CADA

TOC-12 (1/18)

### § 10.2 DISCRIMINATORY OR UNFAIR PRACTICES IN EMPLOYMENT

- § 10.2.1—Discriminatory Practices For Anyone
- § 10.2.2—Employer Discriminatory Practices
- § 10.2.3—Employers And Employment Agencies: Advertising And Publications
- § 10.2.4—Labor Organization Prohibited Practices

### § 10.3 ENFORCEMENT BY THE COLORADO CIVIL RIGHTS DIVISION

- § 10.3.1—CCRD Authority And Structure
- § 10.3.2—Filing A Charge Of Discrimination
- § 10.3.3—Investigation, Dismissal, And Obtaining The Right To Sue
- § 10.3.4—Proceedings After A Probable Cause Finding

#### § 10.4 LITIGATION OF A CADA CASE

- § 10.4.1—Burdens Of Proof And Production In CADA Discrimination Cases
- § 10.4.2—Case And Statutory Analysis Prohibited Practices

# § 10.5 DISCRIMINATION ON ACCOUNT OF LEGAL OFF-DUTY ACTIVITIES

- § 10.5.1—Overview
- § 10.5.2—Prohibited Practices
- § 10.5.3—Defenses

#### **Chapter 11 PROTECTED ACTIVITIES**

### § 11.1 INTRODUCTION

#### § 11.2 ACTIVITIES IN THE PUBLIC INTEREST

- § 11.2.1—Associations
- § 11.2.2—Political Activity And Access To Lawmakers
- § 11.2.3—Whistleblower Protection In The Public Sector
- § 11.2.4—Jury Duty
- § 11.2.5—Voting
- § 11.2.6—Military Duty
- § 11.2.7—Complaints About Wages

#### § 11.3 OTHER ACTIVITIES PROTECTED BY COLORADO STATUTE

- § 11.3.1—Garnishment And Income Assignment
- § 11.3.2—Time Off For Adoption
- § 11.3.3—Inquiry Into Sealed Criminal Records Prohibited
- § 11.3.4—Testing Limitations
- § 11.3.5—Activities Of Volunteer Firefighters

# Chapter 12 TORT CLAIMS FOR WRONGFUL DISCHARGE AGAINST PUBLIC POLICY

### § 12.1 INTRODUCTION

# § 12.2 HISTORICAL DEVELOPMENT OF THE TORT

- § 12.2.1—United States Case Law
- § 12.2.2—Colorado Case Law

# § 12.3 MARTIN MARIETTA v. LORENZ — THE TORT AND ITS ELEMENTS

- § 12.3.1—The *Lorenz* Decision And The Rationale For The Cause Of Action
- § 12.3.2—Elements Of The Tort As Applied Before, In, And Since *Lorenz*
- § 12.3.3—Three Contexts Recognized In *Lorenz* And Beyond

#### § 12.4 DAMAGES

#### § 12.5 OTHER UNRESOLVED ISSUES

- § 12.5.1—Preemption Is There A Common Law Tort If The Employee Has Another Remedy For Wrongful Discharge?
- § 12.5.2—Can A Claim Be Asserted By In-House Counsel?
- § 12.5.3—Does The Employee Actually Have To Be Discharged, Or Can The Claim Be Asserted On The Basis Of Employer Conduct Other Than Termination?
- § 12.5.4—Can Independent Contractors Pursue A Claim?
- § 12.5.5—Employee Misconduct

# § 12.6 SUGGESTIONS TO PLAINTIFF AND DEFENSE REPRESENTATIVES

- § 12.6.1—Plaintiff
- § 12.6.2—Defense

TOC-14 (1/18)

#### **Chapter 13 DEFAMATION**

### § 13.1 INTRODUCTION

# § 13.2 ELEMENTS OF A CAUSE OF ACTION FOR DEFAMATION

- § 13.2.1—Elements Under Colorado Law
- § 13.2.2—"A Defamatory Statement . . ."
- § 13.2.3—". . . Concerning Another . . ."
- § 13.2.4—"... Published To A Third Party ..."
- § 13.2.5—"... With Fault Amounting To At Least Negligence..."
- § 13.2.6—". . . And Either Actionability Of The Statement Irrespective Of Special Damages Or The Existence Of Special Damages To The Plaintiff Caused By The Publication."

# § 13.3 PER SE VERSUS PER QUOD

- § 13.3.1—Per Se Versus Per Quod Generally
- § 13.3.2—Requirement Of Special Damages For A Claim Of Defamation *Per Quod*

# § 13.4 ACTUAL MALICE, PUBLIC VERSUS PRIVATE FIGURES, AND MATTERS OF PUBLIC CONCERN

- § 13.4.1—The Requirement Of Malice
- § 13.4.2—Heightened Burden Of Proof Required
- § 13.4.3—When Must Malice Be Demonstrated?
- § 13.4.4—What Is Malice?

#### § 13.5 PLEADING REQUIREMENTS

#### § 13.6 DEFENSES TO DEFAMATION

- § 13.6.1—Truth
- § 13.6.2—Consent
- § 13.6.3—Privilege

# § 13.7 DAMAGES IN DEFAMATION CASES

- § 13.7.1—Damages Presumed On *Per Se* Claims
- § 13.7.2—Mitigation Of Damages

#### § 13.8 STATUTE OF LIMITATIONS

#### § 13.9 APPELLATE ISSUES IN DEFAMATION LAW

# § 13.10 IMMUNITY FROM CIVIL LIABILITY FOR EMPLOYER DISCLOSING INFORMATION

Chapter 14	WORKPL	ACE	DDIVA	CV
Chabter 14	WURKPL	AUL	PKIVA	L Y

#### § 14.1 INTRODUCTION

# § 14.2 CONSTITUTIONAL PRIVACY INTERESTS

- § 14.2.1—Interests Protected By The Constitutional Right Of Privacy
- § 14.2.2—Substantive Due Process
- § 14.2.3—Fourth Amendment Office Searches
- § 14.2.4—Fourth Amendment Electronic Communications
- § 14.2.5—Fourth Amendment Drug Testing
- § 14.2.6—The Colorado Constitution

# § 14.3 COMMON LAW PRIVACY CLAIMS

- § 14.3.1—Generally
- § 14.3.2—Intrusion Upon Seclusion
- § 14.3.3—Appropriation
- § 14.3.4—Unreasonable Publicity
- § 14.3.5—False Light

# § 14.4 OPEN RECORDS LAWS

- § 14.4.1—Colorado's Open Records Laws
- § 14.4.2—The Colorado Open Records Act
- § 14.4.3—Personnel File Exemption
- § 14.4.4—General Privacy Interests
- § 14.4.5—Colorado Criminal Justice Records Act
- § 14.4.6—Federal Freedom Of Information Act

#### § 14.5 FORMAL DISCOVERY

- § 14.5.1—Specific Privacy-Related Discovery Issues In Employment Cases
- § 14.5.2—Relationship To Open Records Statutes
- § 14.5.3—Personnel Files
- § 14.5.4—Medical Information
- § 14.5.5—Financial And Tax Information
- § 14.5.6—Anonymous Speech
- § 14.5.7—Protective Orders

TOC-16 (1/18)

#### § 14.6 MISCELLANEOUS PRIVACY PROTECTIONS

- § 14.6.1—Generally
- § 14.6.2—Electronic Communications Privacy Act
- § 14.6.3—Stored Communications Act
- § 14.6.4—Health Insurance Portability And Accountability Act
- § 14.6.5—Privacy Act
- § 14.6.6—Privacy Under The Americans With Disabilities Act
- § 14.6.7—The Genetic Information Nondiscrimination Act Of 2008 (GINA)
- § 14.6.8—Legal Off-Duty Activities Under The Colorado Civil Rights Act
- § 14.6.9—Pseudonymous Pleadings

# **Chapter 15 INTERFERENCE WITH CONTRACT**

#### § 15.1 THE ELEMENTS OF INTERFERENCE WITH CONTRACT

#### § 15.2 THE CONTRACT ELEMENT

- § 15.2.1—Basic Contract Principles
- § 15.2.2—Prospective Contracts
- § 15.2.3—Void Contracts Oral And Illegal Employment Agreements
- § 15.2.4—At-Will Contracts

### § 15.3 DEFENDANTS

- § 15.3.1—Parties To The Contract
- § 15.3.2—Supervisors, Officers, And Directors
- § 15.3.3—Subsidiaries

### § 15.4 THE KNOWLEDGE ELEMENT

#### § 15.5 THE INTENTIONAL AND IMPROPER CONDUCT ELEMENTS

#### § 15.6 DAMAGES FOR INTERFERENCE WITH CONTRACT

# § 15.7 PRIVILEGE TO INTERFERE

- § 15.7.1—Qualified Privilege
- § 15.7.2—Absolute Right To Interfere
- § 15.7.3—Relevant Court Decisions

### § 15.8 GOVERNMENTAL IMMUNITY

- § 15.8.1—Public Entities
- § 15.8.2—Public Employees
- § 15.8.3—Attorney Fees Against Plaintiff
- § 15.8.4—Notice Of Claim

#### § 15.9 EXHAUSTION OF REMEDIES

#### § 15.10 STATUTE OF LIMITATIONS

# Chapter 16 NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- § 16.1 INTRODUCTION
- § 16.2 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
- § 16.3 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
  - § 16.3.1—Elements Of The Claim
  - § 16.3.2—Applicability To The Employment Relationship
  - § 16.3.3—Employer Liability
  - § 16.3.4—Exclusivity Bar Of The Workers' Compensation Act
  - § 16.3.5—Pleading A Claim For Outrageous Conduct
  - § 16.3.6—Role Of Judge And Jury; Damages

# **Chapter 17 MISCELLANEOUS TORTS**

#### § 17.1 INTRODUCTION

#### § 17.2 NEGLIGENT TORTS

- § 17.2.1—Negligent Hire
- § 17.2.2—Negligent Supervision And Retention
- § 17.2.3—Negligent Investigation
- § 17.2.4—Negligent Misrepresentation

#### § 17.3 INTENTIONAL TORTS

- § 17.3.1—False Imprisonment
- § 17.3.2—Assault And Battery
- § 17.3.3—Civil Conspiracy

TOC-18 (1/18)

#### § 17.4 FRAUD

- § 17.4.1—Employer Misrepresentations
- § 17.4.2—Employee Misrepresentations
- § 17.4.3—Fraud Distinguished From Negligent Misrepresentation

#### § 17.5 DOCTRINE OF RESPONDEAT SUPERIOR

- § 17.5.1—Employment And Agency Applications
- § 17.5.2—Course And Scope Limitation
- § 17.5.3—Additional Liability Under Agency Principles
- § 17.5.4—Negligent Hiring Is Not Based On Respondeat Superior

# Chapter 18 COMMON LAW DUTIES OF EMPLOYERS AND EMPLOYEES

#### § 18.1 INTRODUCTION

### § 18.2 EMPLOYEE'S DUTY TO EMPLOYER

- § 18.2.1—Duty Of Loyalty
- § 18.2.2—Fiduciary Duty
- § 18.2.3—Duty To Exercise Care And Skill
- § 18.2.4—Duty To Obey Reasonable Instructions
- § 18.2.5—Potential Other Duties

#### § 18.3 EMPLOYER'S DUTY TO EMPLOYEE

- § 18.3.1—Duty To Pay Compensation
- § 18.3.2—Duty To Provide Work
- § 18.3.3—Duty Of Good Faith And Fair Dealing
- § 18.3.4—Duty To Indemnify
- § 18.3.5—Duty Not To Repudiate Or Terminate In Violation Of Contract
- § 18.3.6—Potential Other Duties

# Chapter 19 NONCOMPETITION AGREEMENTS AND TRADE SECRET PROTECTION

#### § 19.1 INTRODUCTION

#### § 19.2 NONCOMPETITION AGREEMENTS

- § 19.2.1—History Of Noncompetition Agreements
- § 19.2.2—Colorado Statute Restricting Noncompetition Agreements
- § 19.2.3—Contracts For The Purchase And Sale Of A Business Or The Assets Of A Business

- § 19.2.4—Contracts For The Protection Of Trade Secrets
- § 19.2.5—Contracts Providing For Recovery Of Education Or Training Expense
- § 19.2.6—Contracts Concerning Executive And Management Personnel And Professional Staff
- § 19.2.7—Noncompetition Agreements Involving Physicians
- § 19.2.8—Restriction On Scope Of Noncompetition Agreements
- § 19.2.9—Enforcement Of Noncompetition Agreements
- § 19.2.10—Choice Of Law

# § 19.3 TRADE SECRET PROTECTION

- § 19.3.1—Definition Of "Trade Secret"
- § 19.3.2—Misappropriation Of Trade Secrets
- § 19.3.3—Enforcement Of Trade Secret Protections
- § 19.3.4—Criminal Prosecution
- § 19.3.5—Misappropriation Of Trade Values
- § 19.3.6—Unjust Enrichment
- § 19.3.7—Breach Of Loyalty/Fiduciary Duty
- § 19.3.8—Preemption Of Common Law Claims By The Uniform Trade Secrets Act

#### § 19.4 NON-SOLICITATION

- § 19.4.1—Contractual Prohibition Of Solicitation
- § 19.4.2—Common Law Prohibition Of Solicitation
- § 19.4.3—Breach Of Fiduciary Duty/Duty Of Loyalty
- § 19.4.4—Tortious Interference
- § 19.4.5—Unfair Competition
- § 19.4.6—Employee Raiding
- § 19.4.7—Statutory Prohibition Of Solicitation

#### Chapter 20 WAGE, HOUR, AND BENEFITS ISSUES

#### § 20.1 INTRODUCTION

# § 20.2 COLORADO LAW ON WAGES

- § 20.2.1—The Colorado Wage Claim Act
- § 20.2.2—Colorado Minimum Wage Order No. 34

TOC-20 (1/18)

#### § 20.3 THE FAIR LABOR STANDARDS ACT

- § 20.3.1—Employees And Employers Subject To The FLSA
- § 20.3.2—Exemptions Under The FLSA
- § 20.3.3—Employers' Obligations
- § 20.3.4—Retaliation
- § 20.3.5—Damages, Defenses, And Penalties

#### § 20.4 EMPLOYEE RETIREMENT INCOME SECURITY ACT

- § 20.4.1—ERISA Coverage
- § 20.4.2—ERISA § 510 Benefits Discrimination

# Chapter 21 REPRESENTING CLAIMANTS AND EMPLOYERS IN COLORADO UNEMPLOYMENT HEARINGS

#### § 21.1 INTRODUCTION

# § 21.2 BEGINNING THE UNEMPLOYMENT INSURANCE BENEFITS CLAIM PROCESS

# § 21.3 ELIGIBILITY GUIDELINES FOR UNEMPLOYMENT INSURANCE BENEFITS

- § 21.3.1—Eligibility Criteria
- § 21.3.2—Exceptions To Eligibility Employees Of Educational Institutions
- § 21.3.3—Exceptions To Eligibility Undocumented Immigrants
- § 21.3.4—Exceptions To Eligibility Seasonal Workers

### § 21.4 ENTITLEMENT TO UNEMPLOYMENT INSURANCE BENEFITS

- § 21.4.1—Full Award Of Benefits (C.R.S. § 8-73-108(4))
- § 21.4.2—Disqualification From Benefits

# § 21.5 DECISION MAKERS IN THE ADMINISTRATIVE PROCESS AND BEYOND

- § 21.5.1—The Deputy Level
- § 21.5.2—Showing Good Cause For A Late Appeal
- § 21.5.3—The Hearing Officer Level
- § 21.5.4—Appeal To The Industrial Claim Appeals Office
- § 21.5.5—Appeal To The Court Of Appeals

# § 21.6 PREPARING FOR THE UNEMPLOYMENT INSURANCE BENEFITS HEARING

- § 21.6.1—Decide On The Legal Theory
- § 21.6.2—Direct And Proximate Cause Of The Separation
- § 21.6.3—The Concept Of Fault
- § 21.6.4—Subpoening Witnesses Or Production Of Documents

#### § 21.7 THE UNEMPLOYMENT INSURANCE BENEFITS HEARING

- § 21.7.1—Overview Of The Hearing Process
- § 21.7.2—Using Documents At The Hearing
- § 21.7.3—Hearsay Evidence
- § 21.7.4—Common Types Of Objections

#### § 21.8 PRECEDENTIAL CASES

- § 21.8.1—The Effect Of Additional Remuneration On UI Benefits
- § 21.8.2—Separations Caused By Off-The-Job Use Of Medical Marijuana
- § 21.8.3—Interpretation Of C.R.S. § 8-73-108(4)(b)(II) Inability To Provide Notification Of Sudden Illness Or Injury
- § 21.8.4—Interpretation Of C.R.S. § 8-73-110(3)(a)(I) Receipt Of Retirement Money Contributed To By A Base Period Employer
- § 21.8.5—Interpretation Of C.R.S. § 8-73-110(1) Receipt Of Retention Bonus, Whether It Is "Other Remuneration," And Its Impact On The Unemployment Claim
- § 21.8.6—Interpretation Of C.R.S. § 8-73-110(3)(a) Effect Of Partial Use Of Lump-Sum Retirement Benefits On Postponement Of Unemployment Benefits
- § 21.8.7—Interpretation Of C.R.S. § 8-73-110(3)(a)(III) Concerning The Retroactive Or Prospective Application Of The 2013 Statutory Amendments

### § 21.9 CONCLUSION

#### **Chapter 22 PUBLIC EMPLOYERS AND EMPLOYEES**

#### § 22.1 INTRODUCTION

# § 22.2 FEDERAL CIVIL RIGHTS STATUTES

- § 22.2.1—42 U.S.C. § 1983
- § 22.2.2—42 U.S.C. § 1981
- § 22.2.3—42 U.S.C. § 1985
- § 22.2.4—42 U.S.C. § 1986

TOC-22 (1/18)

	§ 22.3	ACTIONS TO ENFORCE THE COLORADO CONSTITUTION
	§ 22.4	COLORADO GOVERNMENTAL IMMUNITY ACT
	§ 22.5	ADDITIONAL CONSIDERATIONS FOR GOVERNMENTAL EMPLOYEES
		§ 22.5.1—Federal Employees And Retaliation Claims Under The Age Discrimination In Employment Act (ADEA) § 22.5.2—Educators
		§ 22.5.3—Colorado Open Records Act
	§ 22.6	CONCLUSION
Chapter 23	THE FE	DERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY SS
	§ 23.1	INTRODUCTION
	§ 23.2	OVERVIEW OF THE EEO FORUM
		<ul> <li>§ 23.2.1—Regulatory Background</li> <li>§ 23.2.2—Rights And Remedies</li> <li>§ 23.2.3—Overlap With The Merit Systems Protection Board</li> <li>§ 23.2.4—Exhaustion Of Remedies</li> </ul>
	§ 23.3	FILING AN EEO COMPLAINT
		§ 23.3.1—Informal Complaint/Counseling Process § 23.3.2—Formal Complaint Process
	§ 23.4	INVESTIGATION
	§ 23.5	HEARING REQUEST
	§ 23.6	SETTLEMENT/ADR
	§ 23.7	DISCOVERY
	§ 23.8	PRE-HEARING CONFERENCE
	§ 23.9	HEARING
	§ 23.10	POST-HEARING DECISIONS

	§ 23.11	APPEALS
	§ 23.12	RELIEF
	§ 23.13	OVERVIEW OF THE MSPB FORUM
	§ 23.14	CONCLUSION
Chapter 24	THE CO	DLORADO STATE PERSONNEL SYSTEM
	§ 24.1	INTRODUCTION
	§ 24.2	FUNDAMENTAL CONCEPTS FOR REPRESENTATION BEFORE THE STATE PERSONNEL BOARD
	§ 24.3	PROPERTY RIGHT TO EMPLOYMENT AND MANDATORY HEARING
	§ 24.4	CORRECTIVE AND DISCIPLINARTY ACTIONS
	§ 24.5	APPEALS OF ADVERSE AGENCY ACTION
	§ 24.6	THE BOARD'S SETTLEMENT PROGRAM
	§ 24.7	MOTION PRACTICE BEFORE THE BOARD
	§ 24.8	PRETRIAL PRACTICE: MANDATORY DISCLOSURES AND DISCOVERY
	§ 24.9	APPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT AND THE COLORADO RULES OF EVIDENCE
	§ 24.10	DISCRETIONARY HEARINGS BEFORE THE BOARD
	§ 24.11	ALLEGATIONS OF DISCRIMINATION
	§ 24.12	PROTECTION FOR WHISTLEBLOWERS
	§ 24.13	ATTORNEY FEES AND COSTS
	§ 24.14	THE ALJ'S INITIAL DECISION
	8 24 15	REVIEW OF THE ALL'S INITIAL DECISION

TOC-24 (1/18)

	§ 24.16	JUDICIAL REVIEW OF STATE PERSONNEL BOARD ORDERS
	§ 24.17	INFORMATION AND RESOURCES: STATE PERSONNEL BOARD
	§ 24.18	CONCLUSION
Chapter 25	WORKI	ERS' COMPENSATION AND DISABILITY ISSUES
	§ 25.1	INTRODUCTION
	§ 25.2	WORKERS' COMPENSATION EXCLUSIVE REMEDY PROVISION
		<ul> <li>§ 25.2.1—The "No Fault" Workers' Compensation Scheme</li> <li>§ 25.2.2—Negligence And Intentional Torts</li> <li>§ 25.2.3—Tort Liability Based On Bad Faith Processing Of A Worker's         Claim For Compensation     </li> <li>§ 25.2.4—Denial Of Temporary Disability Benefits To An Employee Who         Is Found Responsible For His Or Her Termination Of         Employment     </li> </ul>
	§ 25.3	WORKERS' COMPENSATION, AMERICANS WITH DISABILITIES ACT, AND FAMILY AND MEDICAL LEAVE ACT—HARMONIZING THE STATUTES, REASONABLE ACCOMMODATION, AND MODIFIED DUTY
		<ul> <li>§ 25.3.1—Summary Of The Statutes</li> <li>§ 25.3.2—Eligibility Criteria: Workers' Compensation</li> <li>§ 25.3.3—ADA's Emphasis On Reasonable Accommodation</li> <li>§ 25.3.4—Interrelationship Of Workers' Compensation, ADA, And FMLA</li> <li>— Issues And Conflicts</li> <li>§ 25.3.5—An Action Plan For Employers</li> </ul>
		VOLUME 2
Chapter 26	WORKI	PLACE VIOLENCE
	§ 26.1	INTRODUCTION
	§ 26.2	WORKPLACE VIOLENCE STATISTICS
		§ 26.2.1—Numbers Of People Injured § 26.2.2—Cost To Employers

# § 26.3 DEFINING WORKPLACE VIOLENCE AND ITS INCREASING PREVALENCE

- § 26.3.1—Creating A Workable Definition
- § 26.3.2—Prevalence Of Violence: A Psychological Perspective

# § 26.4 ADVISING EMPLOYERS

- § 26.4.1—Assessing The Degree Of Risk Common Risk Factors
- § 26.4.2—When And How To Take Threats Seriously
- § 26.4.3—Preventative Strategies
- § 26.4.4—Preventative Policies
- § 26.4.5—Responsive Policies
- § 26.4.6—Agency Recommendations

### § 26.5 THEORIES RELATING TO EMPLOYER LIABILITY

- § 26.5.1—The Colorado Workers' Compensation Act Exclusivity Provision
- § 26.5.2—Evolving Liability Theories
- § 26.5.3—OSHA General Duty Clause
- § 26.5.4—Employers' Potential Liability To Victims
- § 26.5.5—Colorado Statutes Regarding Threats Of Violence
- § 26.5.6—Employers' Potential Liability To Accused
- § 26.5.7—Employers' Potential Criminal Liability

# § 26.6 OTHER RELEVANT FEDERAL STATUTES

- § 26.6.1—The Americans With Disabilities Act
- § 26.6.2—The Employee Polygraph Protection Act

#### § 26.7 OSHA GUIDELINES AND RECOMMENDATIONS

- § 26.7.1—Recognition And Controls
- § 26.7.2—Training
- § 26.7.3—Other

# § 26.8 CONCLUSION

#### **EXHIBIT**

Exhibit 26A—Checklist For Drafting A Workplace Violence Policy

TOC-26 (1/18)

# Chapter 27 PREVENTATIVE MAINTENANCE FOR EMPLOYERS § 27.1 **INTRODUCTION** § 27.2 **GOOD MANAGEMENT PRACTICES** § 27.2.1—How Juries Decide Employment Cases § 27.2.2—Top Ten List: Managing And Avoiding Employment-Related Liability § 27.2.3—What Employees Expect § 27.2.4—Hiring And Selection Process § 27.2.5—Employee Handbooks And Personnel Policies § 27.2.6—Personnel Files § 27.2.7—Training Problems § 27.2.8—Performance Reviews § 27.2.9—Managing Absenteeism, Poor Performance, And Other Workplace Problems § 27.2.10—Joint Employment Issues § 27.3 RESPONDING TO EMPLOYEE COMPLAINTS § 27.3.1—Open-Door Policies § 27.3.2—Conducting Workplace Investigations § 27.4 LAYOFFS AND REDUCTIONS IN FORCE § 27.4.1—Planning A Reduction In Force § 27.5 **DISCHARGING EMPLOYEES** § 27.5.1—Discharging Employees Without Liability § 27.5.2—Unemployment Compensation Claims § 27.6 **EMPLOYEE ASSISTANCE PROGRAMS Chapter 28** LITIGATION OF EMPLOYMENT CASES § 28.1 INTRODUCTION § 28.2 **INITIAL PREPARATION**

(1/18) TOC-27

§ 28.2.1—Plaintiff's Perspective § 28.2.2—Defendant's Perspective

### § 28.3 CHARGES OF DISCRIMINATION

- § 28.3.1—Initial Contacts And Filing The Charge
- § 28.3.2—What Constitutes A Charge
- § 28.3.3—The Employer's Response
- § 28.3.4—Further Proceedings
- § 28.3.5—The Agency Determination And Notice Of Right To Sue

#### § 28.4 CASE MANAGEMENT

- § 28.4.1—State Court
- § 28.4.2—Federal Court
- § 28.4.3—Discovery Proportionality
- § 28.4.4—Arbitrations

# § 28.5 USE OF EXPERT WITNESSES

- § 28.5.1—Expert Witness Discovery
- § 28.5.2—Types Of Experts

#### § 28.6 TRIAL

- § 28.6.1—The Theme Of The Case
- § 28.6.2—Litigation Technology
- § 28.6.3—Jury Selection
- § 28.6.4—Opening Statement
- § 28.6.5—Presentation Of Witnesses
- § 28.6.6—Exhibits
- § 28.6.7—Closing Argument
- § 28.6.8—Jury Instructions And Verdicts
- § 28.6.9—Polling The Jury
- § 28.6.10—Laying Groundwork For An Appeal

#### **EXHIBITS**

- Exhibit 28A—Sample Telephone Intake Form
- Exhibit 28B—Sample Appointment Confirmation Letter
- Exhibit 28C—Sample Personnel File Request
- Exhibit 28D—Contingency Disclosure Statement
- Exhibit 28E—Sample Contingency Fee Agreement
- Exhibit 28F—Sample Hourly Rate Fee Agreement
- Exhibit 28G—Sample Mitigation Of Damages Letter
- Exhibit 28H—EEOC/CCRD Worksharing Agreement
- Exhibit 28I—Courtroom Technology Manual
- Exhibit 28J—Examples Of Article III Judges' Summary Judgment Motion Requirements
- Exhibit 28K—Article III Judges' Practice Standards

TOC-28 (1/18)

#### Chapter 29 DISCOVERY

### § 29.1 DISCOVERY STRATEGY

- § 29.1.1—Plaintiff's Perspective
- § 29.1.2—Defendant's Perspective
- § 29.1.3—First Steps

### § 29.2 DISCOVERY TOOLS

- § 29.2.1—Initial Disclosures
- § 29.2.2—Summary Judgment
- § 29.2.3—Obtaining Admissions
- § 29.2.4—Interrogatories
- § 29.2.5—Requests For Production
- § 29.2.6—Depositions
- § 29.2.7—Rule 35 Examinations
- § 29.2.8—Informal Discovery

# § 29.3 SCOPE OF DISCOVERY AND LIMITS

#### § 29.4 MOTIONS TO COMPELAND RELATED ISSUES

- § 29.4.1—Motions To Compel
- § 29.4.2—Motions To Determine The Sufficiency Of Answers To Requests For Admissions
- § 29.4.3—Sanctions In Regard To Motions To Compel
- § 29.4.4—Motions For Protective Order

#### § 29.5 PRIVILEGES

#### § 29.6 ELECTRONIC DISCOVERY

- § 29.6.1—Electronically Stored Information Comes In Many Forms
- § 29.6.2—Rules Governing Electronic Discovery
- § 29.6.3—Emerging Law On Electronic Discovery
- § 29.6.4—Practice Pointers For Electronic Data Retention
- § 29.6.5—Counsel's "Best Practices" List

#### **EXHIBITS**

Exhibit 29A—Sample Request For Production

Exhibit 29B—Sample Motion To Compel

Exhibit 29C—Stipulation And Protective Order

- Exhibit 29D—Sample Preservation Letter
- Exhibit 29E—ESI Discovery Checklist
- Exhibit 29F—U.S. District Court ESI Discovery Guidelines

#### **Chapter 30 SETTLEMENT AND MEDIATION**

#### § 30.1 SETTLEMENT

- § 30.1.1—Introduction
- § 30.1.2—Timing Of Settlement Discussions
- § 30.1.3—Settlement Conferences

# § 30.2 MEDIATION

- § 30.2.1—Colorado Law Applicable To Mediation Of Employment Matters
- § 30.2.2—Instructive Decisions From Other Jurisdictions
- § 30.2.3—Mediation Venues
- § 30.2.4—Strategic Considerations For Mediation

#### § 30.3 SETTLEMENT AGREEMENTS AND RELEASES

- § 30.3.1—Typical Settlement Agreement Provisions
- § 30.3.2—Enforcement
- § 30.3.3—The Older Workers Benefit Protection Act

#### **EXHIBIT**

Exhibit 30A—Sample Settlement Agreement And Release

#### **Chapter 31 WORKPLACE INVESTIGATIONS**

# § 31.1 THE PRACTICE OF WORKPLACE INVESTIGATIONS IN COLORADO

#### § 31.2 WHY INVESTIGATE?

- § 31.2.1—When A Formal Investigation Is Required By Statute
- § 31.2.2—When A Formal Investigation Is Required By An Employer's Policies Or Practices
- § 31.2.3—To Satisfy Directors' Duty Of Oversight
- § 31.2.4—To Establish An Affirmative Defense To Liability
- § 31.2.5—To Avoid Punitive Damages
- § 31.2.6—When Circumstances Require A Serious Response

TOC-30 (1/18)

# § 31.3 WHAT CONSTITUTES AN ADEQUATE "INVESTIGATION"? § 31.3.1—Three Essential Components Of A Workplace Investigation § 31.3.2—The "Good Enough" Investigation WHEN IS THE OBLIGATION TO INVESTIGATE TRIGGERED? § 31.4 § 31.5 WHO SHOULD INVESTIGATE? § 31.5.1—The Investigator Must Be Competent And Available § 31.5.2—The Investigator Must Screen Out His Or Her Own Biases § 31.5.3—Internal Investigators: Human Resources, Compliance, Ethics Personnel § 31.5.4—The General Counsel Or Outside Lawyer As Investigator § 31.5.5—The Impartial Third-Party Investigator **§ 31.6 HOW TO DO IT: THE INVESTIGATION PROCESS** § 31.6.1—The Planning Stage § 31.6.2—The Evidence Gathering Stage § 31.6.3—The Analysis And Factual Findings Stage § 31.7 PREVENTING RETALIATION § 31.8 **ETHICS FOR INVESTIGATORS** § 31.8.1—The Ethical Rules Apply To Lawyer-Investigators § 31.8.2—Special Ethical Rules Apply To Licensed Investigators § 31.9 WHAT TO DO WHEN THE INVESTIGATION IS OVER § 31.9.1—Decide What To Do § 31.9.2—Follow Up With The Parties § 31.9.3—Track The Results And Properly Store Investigation Files

§ 31.9.4—Set Reminders To Follow Up With Parties

(1/18) TOC-31

CONCLUSION

§ 31.10

# Chapter 32 **ARBITRATION** § 32.1 **INTRODUCTION** § 32.2 STATUTORY OVERVIEW § 32.2.1—Federal Arbitration Act § 32.2.2—Colorado Uniform Arbitration Act § 32.2.3—Statutory Limitations On Arbitration § 32.3 ARBITRABILITY OF FEDERAL AND STATE CLAIMS § 32.3.1—Who Determines Arbitrability? § 32.3.2—Supreme Court § 32.3.3—Tenth Circuit § 32.3.4—Other Federal Cases § 32.3.5—Colorado Cases § 32.4 TERMS OF ARBITRATION AGREEMENTS § 32.4.1—Scope Of Claims § 32.4.2—Remedies § 32.4.3—Punitive Damages § 32.4.4—Cost-Sharing Provisions § 32.4.5—Form Of Arbitration Agreement § 32.4.6—Discovery § 32.4.7—Time Limitations On The Issuance Of An Award § 32.4.8—Class Action Procedures § 32.5 **DEFENSES TO ARBITRATION** § 32.5.1—Common Law Contract Defenses § 32.5.2—Responsibility For Costs § 32.5.3—Interference With Protected Rights § 32.5.4—The Agreement To Arbitrate Must Be Entered Knowingly And Voluntarily § 32.5.5—Matters Not Arbitrable § 32.5.6—Waiver Of Arbitration § 32.5.7—Severability Of Offending Provisions § 32.5.8—FAA Exemptions **COLLECTIVE BARGAINING AGREEMENTS** § 32.6

CHALLENGING THE ARBITRATION AWARD

§ 32.7

TOC-32 (1/18)

#### § 32.8 POLICY CONSIDERATIONS

#### **EXHIBIT**

Exhibit 32A—The Binding Employment Arbitration Agreement: Checklist Of Clauses To Consider

# Chapter 33 ETHICS AND PROFESSIONALISM ISSUES IN EMPLOYMENT LAW CASES

#### § 33.1 INTRODUCTION

# § 33.2 ETHICAL ISSUES IN EMPLOYMENT LAW CASES

- § 33.2.1—The Obligation To Practice Competently
- § 33.2.2—Limiting The Scope Of Representation
- § 33.2.3—Fee Agreements
- § 33.2.4—Avoiding Conflicts Of Interest
- § 33.2.5—Lawyer Behavior During The Discovery Process
- § 33.2.6—Ex Parte Contacts
- § 33.2.7—Dealing With Unrepresented Persons

# § 33.3 CONCLUSION

#### **APPENDICES**

Appendix 1: Frequently Requested Websites

Appendix 2: Employment Law Forms Resources

Appendix 3: State Laws Affecting Employment and Posting Requirements
Appendix 4: Federal Laws Affecting Employment and Posting Requirements

Appendix 5: Sample Employment Law Jury Instructions

#### TABLE OF CASES

#### SUBJECT INDEX