

LAWYER PANEL: HIRING SMART, DISCIPLINING EFFECTIVELY, AND KNOWING WHEN TO FIRE

Julie Capell, Camilo Echavarria, Emilio Gonzalez, and Karen Henry



Hiring Employees



The Employment Application & Interviewing Employees



- Cannot require an employee to pay to apply for a job
- Ensure employment application does not contain prohibited questions
- Any question prohibited on a job application is prohibited in an interview





Guide For Pre-Employment Inquiries





Category	Unacceptable Inquiries	Acceptable Inquiries
Name	<ul style="list-style-type: none">▪ Fact of a change of name▪ Original name of an applicant whose name has been legally changed▪ Maiden name	<ul style="list-style-type: none">▪ Information necessary to check on applicant's work records
Birthplace and Residence	<ul style="list-style-type: none">▪ Birthplace of applicant or spouse or parents or other relatives▪ Questions regarding owning or renting	<ul style="list-style-type: none">▪ Applicant's place of residence▪ Length of applicant's residence in city where the employer is located▪ Statements that hire is subject to verification of legal right to work in the U.S.
Creed and Religion	<ul style="list-style-type: none">▪ Applicant's religious affiliation▪ Church, parish or religious holidays observed by applicant, and whether religious beliefs prevent applicant from working on those days	<ul style="list-style-type: none">▪ None▪ <i>Note:</i> an employer may state regular work days, hours and shifts to be worked, as well as religious days on which operations are closed



Category	Unacceptable Inquiries	Acceptable Inquiries
Race or Color	<ul style="list-style-type: none">▪ Applicant's race or color▪ Color of applicant's skin, complexion, eyes, hair, etc.	<ul style="list-style-type: none">▪ None
Photographs and Fingerprints	<ul style="list-style-type: none">▪ Photographs with application▪ Photographs after interview, but before hiring	<ul style="list-style-type: none">▪ Statement that photograph and/or fingerprints may be required after employment
Age	<ul style="list-style-type: none">▪ Date of birth or age of an applicant (except when such information is needed to meet minimum age requirements)▪ Age specifications or limitations in newspaper advertisements which might bar workers under or over a certain age▪ Dates of attendance or completion of school▪ Questions that tend to identify applicants over 40	<ul style="list-style-type: none">▪ Statement that applicant's hire is subject to verification that he/she meets legal age requirements for the job



Category	Unacceptable Inquiries	Acceptable Inquiries
Education	<ul style="list-style-type: none">▪ Specific years of attendance or graduation▪ Who paid for educational expenses while in school▪ Whether applicant still owes on loans taken out while in school	<ul style="list-style-type: none">▪ Academic, vocational or professional education and the public and private schools attended
Citizenship	<ul style="list-style-type: none">▪ Inquiry into whether applicant is or intends to become a citizen of the U.S.▪ Requirement that applicants produce naturalization or alien registration before employment	<ul style="list-style-type: none">▪ Can you, after employment, submit verification of your legal right to work in the U.S.?
National Origin and Ancestry	<ul style="list-style-type: none">▪ Applicant's lineage, ancestry, national origin, descent, parentage or nationality, applicant's spouse, parent or relative▪ Language commonly used by applicant▪ How applicant acquired ability to read, write or speak a foreign language▪ Driver's license issued to undocumented persons	<ul style="list-style-type: none">▪ What language the applicant speaks, writes, reads or understands (may be asked only if language other than English is relevant to job applying for)▪ Driver's license if required by law or required for the essential job duties



Category	Unacceptable Inquiries	Acceptable Inquiries
Language	<ul style="list-style-type: none">▪ Applicant's mother tongue▪ Language commonly used by applicant at applicant's home▪ How applicant acquired ability to read, write or speak a foreign language	<ul style="list-style-type: none">▪ Languages applicant speaks and/or writes fluently if language other than English is relevant to job applying for
Relatives	<ul style="list-style-type: none">▪ Name and/or address of any relative of applicant	<ul style="list-style-type: none">▪ Statement of company policy regarding work assignment of employees who are related▪ Name and address of parent or guardian if applicant is a minor
Military Experience	<ul style="list-style-type: none">▪ General questions regarding military service such as dates/types of discharge▪ Questions regarding service in a foreign military	<ul style="list-style-type: none">▪ Questions regarding relevant skills acquired during U.S. military service
Credit Report	<ul style="list-style-type: none">▪ Use of credit reports generally prohibited under CA law▪ <i>Note:</i> there are some exceptions, but even if an exception exists, any report that would disclose protected information that is otherwise illegal to ask is prohibited	



Category	Unacceptable Inquiries	Acceptable Inquiries
Social Media	<ul style="list-style-type: none">▪ User names or passwords for applicants personal social media accounts for the purpose of gaining access to those accounts	
Organizations	<ul style="list-style-type: none">▪ Clubs, societies, lodges or organizations to which the applicant belongs, which might indicate protected characteristics▪ Names of any service organizations of which applicant is a member	<ul style="list-style-type: none">▪ Applicant's membership in any job-related professional or trade organization, unless they indicate applicant's protected characteristics
References	<ul style="list-style-type: none">▪ Any questions of applicant's former employers or acquaintances that elicit information concerning applicant's protected characteristics▪ The name of the applicant's pastor or religious leader	<ul style="list-style-type: none">▪ Names of persons willing to provide professional and/or character references for applicant▪ Names of persons who suggested applicant apply for a position with the employer▪ Request of applicant for written consent to a former employer's giving of a narrative job reference



Category	Unacceptable Inquiries	Acceptable Inquiries
Sex and Marital Status	<ul style="list-style-type: none">▪ Sex of applicant▪ Marital status of applicant▪ Number/ages of children or dependents▪ Whether applicant has made provisions for child care▪ Whether applicant is pregnant, breastfeeding or uses birth control▪ With whom applicant resides▪ Whether applicant lives with his/her parents▪ Applicant's maiden name▪ Name of spouse or children▪ Child support obligations	<ul style="list-style-type: none">▪ Name and address of applicant's parent or guardian (for minors only, if applicable to the job)▪ Name and position of any relatives already employed by the company
Sexual Orientation	<ul style="list-style-type: none">▪ Applicant's sexual orientation or any questions designed to determine sexual orientation▪ Questions regarding marital status▪ Questions regarding spouse's name or relation of household members to each other	



Category	Unacceptable Inquiries	Acceptable Inquiries
Gender Identity/Gender Expression	<ul style="list-style-type: none">▪ Questions designed to detect someone's gender, gender identity, transgender status, or gender expression▪ Questions about a person's body or gender-related appearance▪ Questions regarding an applicant's plans to have surgery, medical treatments or regarding gender transition	<ul style="list-style-type: none">▪ None
Arrest/Criminal Record	<ul style="list-style-type: none">▪ General questions regarding arrest record▪ Misdemeanor convictions for possession of marijuana that are more than two years old	<ul style="list-style-type: none">▪ Inquiries about convictions must be job-related and should not include convictions which have been sealed, expunged or statutorily eradicated. Number and kinds of convictions for criminal offenses (must be accompanied by a statement that a conviction will not necessarily disqualify an applicant for employment)



Category	Unacceptable Inquiries	Acceptable Inquiries
Height or Weight	<ul style="list-style-type: none">Any inquiry into height or weight of applicant, except where it is a bona fide occupational requirement	<ul style="list-style-type: none">None
Disability or Physical or Mental Condition	<ul style="list-style-type: none">Inquiry into applicant's general medical condition, state of health or illness, physical or mental disabilitiesRequiring a psychological or medical exam of any applicantQuestions regarding receipt of workers' compensation	<ul style="list-style-type: none">Whether applicant is able to perform the essential functions of this job (if applicant voluntarily discloses a disability, can inquire whether applicant can perform the job notwithstanding the disability or with reasonable accommodation)Statement that employment offer may be made contingent to applicant passing a job-related mental/physical exam
Notice in Event of Emergency	<ul style="list-style-type: none">Name and address of relative to be notified in case of accident or emergency	<ul style="list-style-type: none">Name and address of person to be notified in case of accident or emergency



Records	Retention Period
Recruitment, Hiring and Job Placement Records	3 years
Payroll Records	4 years
Employee Wage Records	3 years (if overlap with Payroll Records, retain for 4 years)
Child Labor Certificates and Notices	3 years
Employee Personnel Files	3 years after termination
Employee Health Records	5 years (recommended)
Unlawful Employment Practices, Claims, Investigation and Legal Proceedings Records	Until disposition of case

Forms Required For New Employees



- Written Commission Agreement (if commissioned employee)
- W-4 Form: Employee Withholding
- I-9 Form: Employment Eligibility Verification
- Workers' Compensation Brochure
- Form DE 2515: Disability Insurance Pamphlet
- Form DE 2511: Paid Family Leave Pamphlet
- General Notice of COBRA Continuation Coverage Rights (if offering a health plan)
- Form DE-34: New Employee Report
- New Health Insurance Marketplace Coverage Options and Your Health Coverage (if covered by the FLSA)
- Wage and Employment Notice of Employees
- Sexual Harassment Information Sheet
- Harassment, Discrimination and Retaliation Prevention Policy & confirmation of receipt
- Form B1-4 Permit to Work (if employee is a minor)



- Upon hire, you might consider training your employees on:
 - Safety
 - Policies and work rules
 - Benefits availability and eligibility
 - Emergency procedures
 - Preventing harassment, discrimination, and retaliation
 - At-will employment
 - Confidentiality
 - Internet, email, and cell phone usage



Hypothetical: Peter Pan Interviews For A Job



- You interview a candidate for a respiratory therapist position

an
du

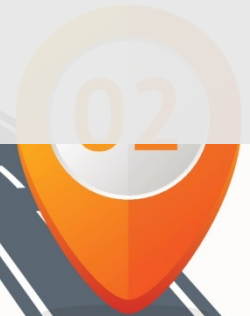
- You see

- Can
can





MANAGEMENT AND DISCIPLINE



General Principles



- Fairness is the primary concern of a jury
- Employee doesn't need to be good, just not worse than peers
- Don't document every picky thing (witch hunt)
- Don't wait until it is too late or last straw (pretext & retaliation)
- Document positive conduct

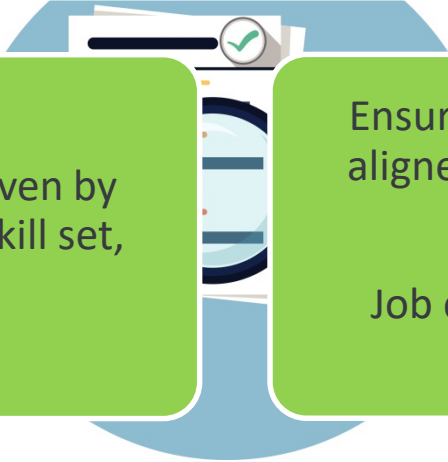


Performance Reviews: Consistency in the Evaluation Process



Due to attrition within his department at Hospital, Plaintiff is promoted to a “Director” position but continues to perform “Manager” duties even though he now has higher title and salary. Supervisor continues to assess Plaintiff based on prior (Manager-level) duties and gives Plaintiff high marks. Due in large part to Plaintiff’s inability to keep his department relevant to the organization, Plaintiff’s position is eliminated and his department is absorbed into a new department to be headed by a Director-level employee. Plaintiff applies for but does not get the new Director position, which goes to a 23 year-old woman who had never held a Director position before.

Plaintiff sues for age discrimination and uses the positive performance reviews as evidence that he was qualified for the new Director position.



Avoid promotions that are driven by length of service rather than skill set, talent and ability.

Ensure that performance criteria are aligned with actual job expectations.

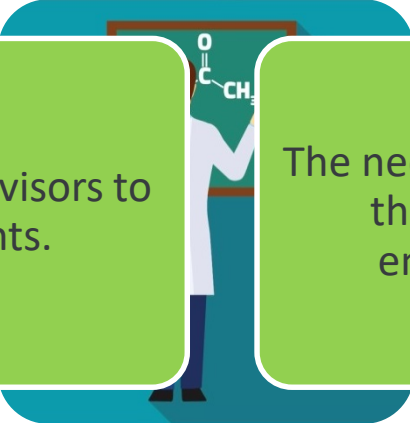
Job comparison memos should be carefully drafted.

Performance Reviews: Consistency in the Evaluation Process



Plaintiff is a research scientist at Medical Center. For the first two years of Plaintiff's employment, Supervisor simply accepted and ratified Plaintiff's self-assessment based on his belief that a fellow Ph.D. does not need to be monitored. During Plaintiff's third year, Supervisor learns that Plaintiff has botched the integration of a new research tool and hears from peers that they have lost confidence in Plaintiff's research. Supervisor gives Plaintiff a poor review and discharges Plaintiff for poor performance.

Plaintiff sues Medical Center for age and gender discrimination and uses the performance review as evidence that she was performing her job well and thus her discharge was unjustified.



The importance of training supervisors to provide accurate assessments.

The need to get HR or legal involved when there is a dramatic change in the employee's performance rating.

Performance Reviews: Consistency in the Evaluation Process



Plaintiff negotiates, drafts and manages leases for Hospital. He receives high marks in his performance review for his thoroughness and responsiveness. Hospital then changes real estate strategy and embarks on a campaign of aggressive expansion, requiring Plaintiff to provide strategic input regarding the expansion objectives and to move deals along much more quickly than before. Plaintiff struggles under new expectations and continues a “business as usual” approach. As a result, Plaintiff receives poor performance ratings for first time in his 10-year tenure with Hospital. Hospital hires a younger employee to handle new demands and to supervise Plaintiff.

Plaintiff sues Hospital for age discrimination and uses the performance review as evidence of pretext.

Memorialize and formalize the change in job duties and obtain an acknowledgment from the employee regarding the new expectations.

LEA

If the job expectation changes, the performance review criteria should change as well.

Performance Improvement Plans



In January, after Plaintiff fails to achieve a certification required for her job as a Billing Systems Specialist for Hospital, she is placed on a Performance Improvement Plan that identifies the lack of certification as the only area needing improvement. The PIP specifies that Plaintiff has three months (until the end of March) to achieve certification. As of April, Plaintiff has not achieved her performance goal, but she remains employed. In July, Plaintiff requests medical leave. In September, upon her return from medical leave, Plaintiff is discharged for failing to achieve the goal specified in her PIP.

Plaintiff sues Hospital for disability discrimination and uses the Hospital's delay on following through with the PIP as evidence of pretext.

Track and follow up on a PIP.
Communicate extensions or exceptions.

Communicate termination decision to the employee ASAP, even if the termination process is expected to take a while.



Plaintiff was discharged because he consistently sent aggressive and rude emails to Supervisor and coworkers. In his lawsuit, Plaintiff alleged that his aggressive behavior was a manifestation of his mental disability. Employer maintains that it did not know and had no reason to suspect that Plaintiff's behavior was related to a mental disability. After the discharge decision was made but before it was communicated to Plaintiff, Supervisor sent an email to HR noting that Supervisor believed there was "something wrong" with Plaintiff and that Plaintiff "probably needs some help."

Plaintiff sues for disability discrimination and uses email as evidence that Employer had a reason to believe that his behavior was caused by a mental disability.

1

Emails should focus on workplace performance and workplace safety and not on personality traits or behavior.



After Supervisor at Hospital receives complaints from several executives regarding Plaintiff's poor performance, Supervisor sends email to the same executives listing unattributed criticism of Plaintiff's performance and soliciting "feedback" from the executives regarding Plaintiff's performance. Supervisor then uses emails from executives as "support" for terminating Plaintiff.

Plaintiff sues Hospital for age discrimination and uses email as evidence that performance concerns were pretext.

Stress the importance of partnering with HR and legal when managing a performance issue, particularly one involving a long-term employee.

Be able to demonstrate good faith in all performance evaluations by soliciting open, honest feedback rather than directing the conversation.



After Plaintiff misses several months of work, Supervisor at Medical Center sends email requesting permission to hire someone else because the Plaintiff's job is critical to the group. A few months later, while Plaintiff is still on medical leave, same supervisor requests that Plaintiff's job be eliminated because it had become redundant.

Plaintiff sues for disability discrimination and uses email as evidence that Supervisor was looking for an excuse to fire Plaintiff.

Pick up the phone.

Investigations: “Facts”, “Opinions” and “Conclusions” in Workplace Investigations



Plaintiff claims that Supervisor made offensive racial comments directed at Plaintiff. HR speaks with witnesses identified by Plaintiff. Witnesses do not corroborate Plaintiff’s claim but describe Supervisor as having a bad temperament and as being blunt to the point of rudeness. In the final report, HR investigator notes that while no one corroborates race-based harassment, Supervisor may have “harassed” Plaintiff by yelling at Plaintiff in front of others.

Plaintiff quits and sues for racial discrimination and constructive discharge and uses HR’s use of the term “harassed” as evidence that she was subjected to actionable harassment.

Avoid any legal conclusions. Instead, provide descriptive language re comments and behavior.

Okay to comment on witness credibility.

Investigations: “Facts”, “Opinions” and “Conclusions” in Workplace Investigations



Plaintiff complains of sexual harassment by Supervisor. During HR investigation, HR concludes that the sexual harassment allegations are unfounded but learns about other policy violations by Supervisor. The HR investigation report states that the Supervisor is discharged as a result of policy violations unrelated to Plaintiff’s complaint.

Plaintiff sues for sexual harassment and uses the HR report as evidence that Hospital is white-washing facts to avoid liability.

Have ER notes separately list or identify issues or concerns that are not related to the Complainant’s allegations or complaints. Separately determine whether these issues or concerns may or should result in a separate investigation and record those reasons in notes.

Investigations: “Facts”, “Opinions” and “Conclusions” in Workplace Investigations



During a deposition, employee-witness disavows comments attributed to her in the HR investigation notes.

Plaintiff uses the HR investigation notes as evidence that Medical Center is fabricating facts.

A signed written statement by the claimant and witnesses can be very helpful, but not always practical.

Investigations: “Facts”, “Opinions” and “Conclusions” in Workplace Investigations



Plaintiff is interviewed by HR after she complains of sexual harassment by coworker. The interview notes describe conduct that, even if true, would not constitute harassment. Plaintiff, however, claims that HR notes do not accurately reflect what she reported to HR.

Plaintiff uses the HR notes to argue that Employer is hiding or fabricating facts.



Investigations: “Facts”, “Opinions” and “Conclusions” in Workplace Investigations



Document that complainant confirms the scope of investigation. Can be done in variety of ways, including documenting confirmation in investigation report or email to employee with specific allegations.

Identify witnesses and documents.

A signed written statement by the claimant and witnesses can be very helpful, but not always practical.

Make sure investigation aligns to what is documented in those allegations.

Have the ER final report focus on the specific allegations.

If allegations are not substantiated but investigation uncovers negative comments regarding alleged harasser, have ER final report explain why the negative feedback is not material to the ultimate finding and, if appropriate, explain whether the conduct was nevertheless material to a separate investigation.

Summary re Performance Reviews



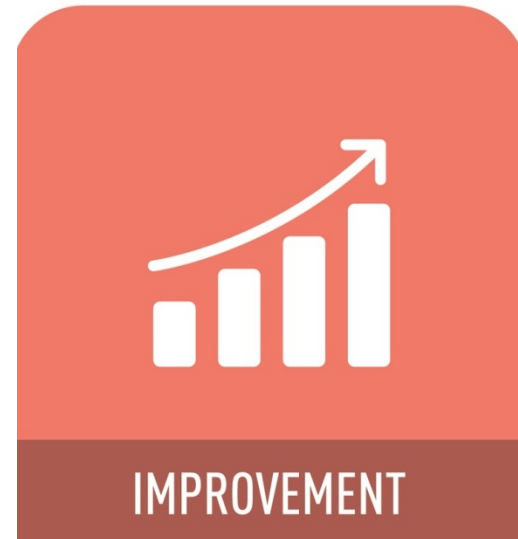
- Set expectations at the start
- Align review with expectations
- Document that employee understands expectations
- Describe performance
- Document failure to meet expectations
- Use objective and consistent criteria; same criteria and same scale for all
- Calibrate or standardize scores (HR overview)



Performance Improvement Plans



- Documents issues of concern
- Gives fair warning
- Shows good faith
- Can prevent discharge, through correction or departure



Summary re Investigations



- Establish the employee's version and perspectives
- Emphasize your no retaliation policy
- Interview witnesses and get valid evidence: Information that will help determine the issues ***relevant to the investigation***
- Objective descriptions – facts, **no speculation or labels** (alcoholic, bad attitude, incompetent, racist)
- Describe credibility factors: realistic, consistent, corroborated, demeanor
- Check for bias
- Report on investigation
- Discipline proportionately





WHEN IT DOESN'T WORK OUT Counseling and Termination



A Key Legal Issue: Employment At Will



- The concept of **employment at will**:
- An employment relation of unspecified indefinite duration is presumptively employment “at will,” terminable by either the employer or the employee with or without cause.



- The *employee* can end the employment relationship at any time, with or without cause or reason and with or without notice.
- *Unless the Company has promised something different, the Company can end the employment relationship at any time, with or without cause or reason (except for a discriminatory reason or in retaliation for protected activity like whistleblowing) with or without notice.*



- Collective Bargaining Agreement controls
- BUT, discrimination and retaliation laws still apply!





- Disparate Treatment
- Retaliation
- Harassment
- Failure to Accommodate
- Pregnancy

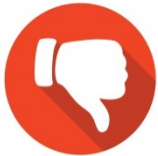




Coincidence v. Causation



Fired & Over 40 \neq Discrimination



Fired Because Over 40 = Discrimination



Fired & Woman \neq Discrimination



Fired Because Woman = Discrimination

Protected Classes



- Gender
- Race/National Origin/Color
- Age (Over 40)
- Disability (Physical/Mental)
- Religion/Creed
- Veteran Status
- Marital Status
- Pregnancy
- Sexual Orientation



Discrimination Claims



It was because
of my _____

Your
performance
was lousy.

Prove it!

Stereotypes



- Older Workers:

- Less Stamina
- Resistant to Change
- Overqualified



- Pregnant Workers:

- More Fragile
- Need Time Off



You Be The Judge



- Female employee is terminated and replaced by male employee.
 - Discrimination?

___ Yes

___ No



You Be the Judge



- Employee over the age of 40 is terminated because the company wants to make its workforce younger and more adaptable to change.
 - Discrimination?

___ Yes

___ No



RETALIATION: Adverse Action



- Fired
- Harassed
- Hours Reduced
- Transferred
- Denied Training

Because of →



RETALIATION: Protected Activity



- Complaining of Discrimination
- Alleging Harassment
- Going to State Agency
- Requesting Accommodation
- Taking Leave of Absence



Termination & Complained of Harassment \neq Retaliation

(Coincidence)

Termination Because of Harassment Complaint = Retaliation

(Causation)



- Human Emotion
- Hot Claim
- Risk is Easy to Spot
- You Can (and Should) Enforce Business Needs





- Hire Quality People
- Focus on Performance
- Be Consistent, or Have Good Reason
- Communicate with Employee
- Consult Human Resources
- Document “Because of” Reasons



- Upside: Improves performance
- At minimum:
 - Have documented problems
 - Makes next conversation easier
 - Minimizes “surprises”
 - Helps prevent claims
 - Helps defend claims



Why Document?



- Communication tool
- Reduce liability
- Preserve events/prove dates
- Freeze testimony
- Improve credibility





- Procrastination/Delay
- Insufficient attention and time
- Adopting the employee's opinion
- Avoiding the “negative”
- Not focusing on specific goals
- Not establishing objective measures

Termination: Evaluate Risk



- No decision is risk free.
- Any termination can lead to litigation and cost.
- Assess likelihood of scrutiny.
- Prepare for scrutiny.



Off-Duty Conduct Laws



- Some states have laws that prohibit employers from considering off-duty conduct when making adverse employment decisions.
- At least nine states, including New York, California, North Dakota, and Illinois, have laws banning employment discrimination based on legal off-duty recreational behavior.
- Employer may find a post revealing:
 - Smoking
 - Drinking
 - Sexually Suggestive poses
 - Engaging in political/social activities



Disciplinary Decision Tree



Employment at-will, or
subject to contract /
CBA?



Does conduct violate
employer policies (SM
others)? If so, what
policy?



Unless you're a
government employer,
there's generally no
"right to free
speech"...

- ... but, are there lawful off-duty conduct laws at issue?



Cannot discipline for
statements regarding
wages, hours, or
working conditions.



Would you discipline if
the same thing were
said in the workplace?
Have you disciplined
for this before?



About Davis Wright Tremaine



- Over 500 lawyers
- Full-service transactional, litigation and regulatory practices
- Strong industry teams, particularly in communications, media, technology, health care, energy, financial services, hospitality and life sciences



Speaker Contact Information



Karen A. Henry
Counsel
karenhenry@dwt.com
213.633.6832

Julie M. Capell
Partner
juliecapell@dwt.com
213.633.6845

Camilo Echavarria
Partner
camiloechavarria@dwt.com
213.633.6854

Emilio G. Gonzalez
Partner
emiliogonzalez@dwt.com
213.633.6829