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Employment Law for Law Firms: Do the Shoemaker's Children Need New Shoes?, Part 1

by Steven L. Schwarzberg, Kerry A. Raleigh, Larry A. Strauss, David I. Spector, Christopher S. Duke, Lorraine O'Hanlon Rogers, Arlene K. Kline and Scott A. Atherton

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You love that your secretary Betty plows through lunch to get your letters done and out to the client, taking bites of her turkey on rye in between keystrokes. You empathize with summer associate Joe, working until midnight, zealously getting your research done, and think back to your own days of late nights and flash a knowing smile. You're grateful for your paralegal Sue, who is always willing to take work home with her to make sure she gets it done.

The problem is, while you are loving, empathizing, and being grateful, you are potentially violating the overtime compensation provisions of the Fair Labor Standards Act (FLSA).¹ You also just might be on the receiving end of a not-so-nice lawsuit from lovely Betty, helpful Joe, and super Sue as a result.

The FLSA presents just one (albeit a large) part of the employment law quagmires facing the uneducated employer, and law firms are certainly not immune. As lawyers we are often so busy advising others how to stay out of legal predicaments that we may forget to keep our own house in order. This article offers some of the housekeeping tips law firms can use to make sure they are meeting their own obligations as employers.

Sizing Up the Situation

The sound approach is to try to stop trouble before it begins and employ measures at the recruitment and interviewing stages to minimize future problems. You may have heard the adage, "believe none of what you hear and half of what you see, and you'll get along fine in life." When it comes to resumes and interviews, that's sound advice. Don't rely on them until you have confirmed the claims made on and in them. Some cases in point:

- Remember Michael Brown, the former FEMA director who gained prominence during the inquiries about the inadequate Hurricane Katrina relief efforts? Apparently his FindLaw.com profile boasted he was an "outstanding political science professor" at Central State University. This was not true, according to a *Time* magazine investigation, which found he was only a student there.²
- According to a *USA Today* article in February 2006, Radio Shack Chief Executive Officer David Edmonson lied on his resume, claiming to have a four-year degree when he didn't.³
- More than 50 percent of all resumes are bound to have some form of inaccuracies, ranging from falsified exam results and exaggerated work experience to blatant lies or omissions.⁴

It's not enough to take Bar passage at face value, either. Go ahead and hire an attorney without confirming he or she is actually licensed by The Florida Bar and let the billing begin. Once it is discovered that person has been engaging in the unlicensed practice of law, you can take the time to refund all of those billables, and endure the embarrassment of having to do so. Afterward, you can reflect on the fact that it all could have been avoided with a 60-second visit to the Bar's Web site or a call to its office.⁵

When hiring recent graduates, ask to see a copy of their Florida Board of Bar Examiners letter confirming passage of the exam once the results are out, and verify its authenticity.

The due diligence does not stop with attorneys, of course. Support staff and others are also part of the interviewing and hiring process. Confirming claims on resumes regarding everything from typing speeds to employment history will help you to gauge a person's true level of competency and lets you know you are getting a person whose experience in reality mirrors what is on paper.

On the nuts and bolts side, some of the interview dos and don'ts bear repeating:

- *Pregnancy*: Off limits. Do not ask questions about family planning, number of children, etc.
- *Religion*: Avoid commenting on a job candidate's cross, Star of David, or hex sign, for example. It may be viewed as if you have issues with those items — and the person. If the candidate is not hired, it then *can* become an issue for you.
- *Criminal Record*: It is permissible to ask if someone has ever been convicted of a crime. Don't ask if he or she has ever been arrested.
- *Citizenship*: Stick to the tried and true: "Are you able to work in this country?"

Can They Stay or Should They Go?

Lawyers come and lawyers go, but surely their departures tend to be the messier of the two occurrences. Imagine this scenario: It's five o'clock on a Friday and your prized associate walks into your office and says, "I really hate to tell you, but I am leaving, and thank you for your client list because I plan on calling every one of your clients, even though I have only worked for your firm for six months." What are your responsibilities to your clients and your firm under the ethical rules when a lawyer leaves your firm?

First, the Rules Regulating The Florida Bar apply. Rule 4-5.8⁶ details the responsibilities for lawyers and law firms when a lawyer leaves a firm. Among the first questions that come to mind: Who gets to notify the clients about the attorney's departure? If you want ultimate control over who gets to pick up the phone and tell the client, put it in an employment or operating agreement. The Florida Bar has explicitly said such agreements control the issue.

Absent a specific agreement, the lawyer leaving is not permitted to unilaterally notify clients. The lawyer and the law firm must work together to develop a joint notice that goes to that client. If you cannot work out a joint response, then the departing lawyer and the firm are allowed to unilaterally contact clients. Certain things must be addressed when you make that notification:

- Advise the client the lawyer is leaving.
- Advise the client he or she has the right to stay with the firm, go with the departing lawyer, or pick an entirely new lawyer/firm.
- Advise the client if he or she leaves, the client is still obligated to pay the firm's fees and costs that existed as of that date.

Also, when it comes to client notification of an attorney's departure, it doesn't matter if the person is an associate or a partner. As in the practice of law in general, it's all about the relationship the lawyer has developed with that client. That relationship triggers the notice that must be given following the rule.

Furthermore, a firm cannot restrict a lawyer's ability to practice law after his or her termination. The Florida Bar, in Ethics Opinion No. 93-4,⁷ found that an employment agreement that 1) prohibited an associate during the two years following the associate's departure from the firm from soliciting the firm's clients and inducing the firm's employees to quit; and 2) required that if the associate did solicit a firm client and the client followed the associate, the associate was required to pay the firm 50 percent of any fees generated, violated Rule 4-5.6(a), which prohibits agreements that restrict the rights of a lawyer to practice after the termination of the relationship.⁸

Rule 4-5.6 states that you cannot enter into an agreement with a lawyer that restricts the lawyer's ability to practice law after his or her termination. As a result, it is very clear that non-compete agreements between attorneys are unenforceable. The Bar's Ethics Department also advised restrictions on attorneys' fees are also impermissible, because they unfairly interfere with the attorney-client relationship.⁹

They Can Leave, But They Can't Always Take It With Them

Removal of client files is often another area of contention when an attorney departs a firm. Here the answer is clear, courtesy of The Florida Bar Ethics Opinion 69-1. In the absence of controlling governance language in a partnership or operating agreement, the files belong to the firm. A departing lawyer cannot take those files, absent the client's express consent.

One area of perceived ambiguity often arises over clients who've not paid their bills. Here, too, however, the answer is clear. A law firm cannot hold the client's file hostage in an attempt to get the client to pay its bill. Doing so interferes with the client's new lawyer's ability to effectively represent the client, and you run the risk of a Bar grievance.

Attorneys (especially partners) also need to be mindful of their fiduciary duties to their firms, and the applicability of the Uniform Trade Secrets Act (UTSA), which has been adopted in Florida.¹⁰ Such things as a firm's business plan, financial information, and client list are generally protected under the UTSA. If an attorney decides to take such information on his way out the door, UTSA offers the firm an avenue for enforcement, including injunctive relief.

Overtime

Now that you've worked through some of the issues involved in the arrival and departure of your attorneys and staff, let's contend with a critical day-to-day concern: the hours your non-exempt employees work, and how you pay them for that work — notably, the hours beyond the standard work week. A law office generally does not keep "banker's hours." Indeed, many attorneys and staff get to work early or stay late every day (often both), and staff — especially paralegals, interns, and law clerks — may join attorneys in working some hours on the weekends. Given the more professional rather than clerical nature of their work, the temptation to classify paralegals, interns, and/or law clerks as exempt employees may be appealing, but firms must avoid the temptation of doing so.

Under the FLSA, wage and overtime exemptions exist for bona fide executive, administrative, or professional employees.¹¹ The professional and administrative exemptions each require that the employee be paid a salary of at least \$455 per week in order to apply. However, this salary threshold is just one requirement. Even assuming that the salary requirement is met, paralegals, interns, and law clerks *may not fall within these exemptions*. A closer look is needed.

Paralegals. The skill sets, backgrounds, and experience levels of paralegals may vary considerably, fueling a desire to claim a professional exemption where the qualities lie on the high end of the spectrum. For example, Paralegal A has a four-year college degree and 10 years of experience, reviews and assesses documents, prepares draft discovery requests and responses, as well as pleadings — everything up through the final approval and signature of the attorney. Paralegal B, on the other hand, may have a high school diploma and perform slightly more than secretarial tasks.

Despite those glaring differences in our sample paralegals' skill sets, Paralegal A is not exempt from overtime. The Department of Labor has addressed this issue, consistently finding that paralegals do *not* fall within the most applicable exemptions — administrative and professional.¹² Most paralegal positions do not require a prolonged course of advanced study in the field of science or learning required for the professional exemption.¹³ Further, because the paralegal is subject to the final approval and review of an attorney, the paralegal position does not require the requisite level of independent discretion and judgment to qualify under the professional or the administrative exemption.¹⁴ If the paralegal's work is being billed to a client, he or she is probably a production employee, and, thus, ineligible for the administrative exemption in any event.

Of course, as with most things in the law, there are exceptions: If a paralegal has an advanced degree in a field other than law, and uses that advanced degree in the performance of his or her duties, the paralegal may be exempt. For instance, if a paralegal has an engineering degree and uses it to advise an attorney on an application for a patent, then that paralegal may be exempt under the FLSA.¹⁵

Interns. It is important to know the difference between a volunteer (or perhaps unpaid internship) and an intern. You may be approached by a bright-eyed, first-year law student who wants to come to your firm over the summer for the experience and work for free. It is a very nice offer from your perspective. However, the Department of Labor and the courts don't recognize a volunteer relationship for private, for-profit companies.¹⁶ So what you may have is an employee who needs to be paid minimum wage and overtime.

There are certain criteria which must exist in order to have a bona fide internship.¹⁷ Essentially, the internship should focus on the training and educational type instruction that is for the benefit of the intern. If the internship relationship offers a material benefit to the employer (such as being able to bill clients for a substantial portion of the intern's work), chances are it may not be a bona fide internship. In such instances, the intern may be considered an employee and firms must pay them at least the minimum wage and overtime.

Some colleges and law schools have a clinical program with a curriculum and a lot of oversight. Such programs probably do qualify as internships. However, for the intern recruited through a nonschool-sanctioned program, firms need to be very cautious about how they compensate interns. The

conservative, perhaps safer, approach is to consider them nonexempt employees, and pay them at least the minimum wage and overtime.¹⁸

Law Clerks. FLSA exemptions for law clerks can be a tricky business. Some law firms treat law clerks as exempt under the FLSA, typically relying on the professional exemption. Although the professional exemption can apply to *licensed* attorneys who have achieved their juris doctorate, law students do not yet have their license or degree, nor are they allowed to actually practice law (subject to limited exceptions).

Employers have to keep a close eye on the type of work law clerks are doing. For example, if clerks spend a lot of time doing clerical or other administrative work, they may not qualify for an exemption. Moreover, if the law clerk is really acting as a paralegal, he or she may not be exempt as set forth above. Thus, in light of the uncertainty surrounding law clerk exemptions, the safest approach may be to treat them as nonexempt employees, in which case they would be entitled to overtime compensation as well.

Time Management

Once you determine whether an employee is exempt or nonexempt, you have a baseline to determine who is entitled to overtime. Then it becomes a matter of managing that overtime through the policies you implement.

Under the FLSA, the employer has the burden to show that its time and pay records are reliable.¹⁹ These records will have to overcome an employee's verbal claim of working off the clock, through lunch, or at home. If you let an employee take work home, what mechanism do you have in place to show that he or she worked one hour as opposed to six hours? If you allow employees to work through lunch or on weekends, how will you prove you paid them for all hours worked?

For nonexempt employees, firms should consider having a rule against working unauthorized overtime. While you have to pay an employee for any overtime worked — even unauthorized overtime (if they work it, they get paid for it), an employer can discipline an employee for any unauthorized overtime. Some firms also require that employees review and sign their time and pay records and have a policy in place that instructs employees to notify their supervisor if they believe their pay or time records are not accurate.

Although you do not have to pay your independent contractors and exempt employees overtime under the FLSA, you must also be careful as to both.

Independent Contractors. If you have true independent contractors, they are not employees, and as a consequence, you don't have to pay them overtime.²⁰ However, just calling someone an independent contractor doesn't make it so, nor does just having a contract with them.²¹ The Department of Labor and the courts look at the economic reality of the situation, and have actually laid out a number of factors to consider as part of a fact-intensive test.²²

For example, if a firm hires a lawyer and calls him an independent contractor, but controls the work he or she does, how and when it is done, assigns staff to that person, and reimburses the individual for any costs incurred, chances are the so-called independent contractor is actually an employee. So if the individual is paid hourly, he or she needs to be paid overtime because, as stated above, to qualify under these exemptions the employee must be paid a bona fide salary. If you lose the salary component, you most likely lose the exemption.

For exempt employees, an area of concern is not doing anything to jeopardize their exemption. If you start making *improper* deductions from an employee's salary based on the amount of hours worked, this may no longer be considered a true salary — at which point you may lose exempt status.²³

So what is a *proper* pay deduction?²⁴ A basic example includes when an exempt employee misses or is absent from work for one or more full days for a personal reason other than sickness or disability, or an employee takes an unpaid leave of absence under the Family Medical Leave Act of 1993 (FMLA).²⁵ An isolated mistake is not necessarily going to cost an employee's exempt status. However, if the employee can show a common practice in which every time an exempt employee works a half-day, the employer makes a pay deduction, it is likely to support a finding that the employee lost his or her exempt status.²⁶

Thankfully, the FLSA has a safe harbor provision to protect an employer from losing the employee's exempt status. There are three factors an employer must satisfy to benefit from the provision:

- Have a policy in place, preferably in writing, that is given to employees and specifies the employer will not make improper pay deductions and provides a complaint mechanism;

- Reimburse employees for any improper pay deductions made;
- Do not make any willful violation or continued violation of the improper pay deduction once the employer or other employees complain about improper pay deductions.²⁷

To minimize the risks of running afoul of the FLSA, firms should ensure that their employees are properly classified as exempt or nonexempt, keep accurate time and pay records, have appropriate policies in place, and protect the exempt status of their exempt employees.

¹ 29 U.S.C. §201 *et seq.*

² Daren Fonda & Rita Healy, *How Reliable Is Brown's Resume?*, Time (Sept. 8, 2005), available at <http://www.time.com/time/nation/article/0,8599,1103003,00.html>.

³ *RadioShack CEO Lied on Resume*, USA Today (Feb. 16, 2006), available at http://www.usatoday.com/money/companies/management/2006-02-16-lying-exec_x.htm.

⁴ Steve Boggan, *Nice CV, Shame About the Lies*, The Guardian (UK) (October 10, 2006), available at <http://www.guardian.co.uk/money/2006/oct/10/workandcareers.g2>.

⁵ The Florida Bar, Find a Lawyer, <http://www.floridabar.org>, click on "Find a Lawyer," or call (850) 561-5832.

⁶ Rules Regulating The Florida Bar 4-5.8, available at <https://www.floridabar.org/divexe/rtrfb.nsf/FV/5FD4074FB6E696DE852570DF006EDDE9>.

⁷ Florida Bar Ethics Opinion 93-4, available at <http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm>.

⁸ *See id.*

⁹ *See id.*

¹⁰ Fla. Stat. §§ 688.01-688.09 (2007).

¹¹ 29 U.S.C. §213; *see also* 29 C.F.R. Part 541. (For administrative exemption, *see* 29 C.F.R. §541.200-§541.204; for professional exemption, *see* 29 C.F.R. §541.300-§541.301).

¹² *See* DOL Wage and Hour Opinion Letter, 2005 WL 3638473 (December 16, 2005); DOL Opinion Letter, 2006 WL 2792441 (July 24, 2006).

¹³ 29 C.F.R. §541.301(e)(7).

¹⁴ *See* DOL Wage and Hour Opinion Letter, 2005 WL 3638473 (December 16, 2005); DOL Opinion Letter, 2006 WL 2792441 (July 24, 2006).

¹⁵ 29 C.F.R. §541.301(e)(7).

¹⁶ *See* DOL Fair Labor Standards Act Advisor — Volunteers, available at <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp>.

¹⁷ *See* DOL Wage and Hour Opinion Letter, 2006 WL 1094598 (April 6, 2006).

¹⁸ Note that under 29 C.F.R. §541.304(c), employees engaged in internships, whether licensed prior to the commencement of the programs, qualify as exempt professionals if they enter such program *after* earning the appropriate degree.

¹⁹ See 29 U.S.C. §211(c).

²⁰ See *Dole v. Shell*, 875 F.2d 802, 804-805 (10th Cir. 1989).

²¹ See *id.* at 804.

²² See *id.* at 805.

²³ 29 C.F.R. §541.603(a).

²⁴ 29 C.F.R. §541.602(b) sets forth proper pay deductions.

²⁵ 29 U.S.C. 2601, *et seq.* Unpaid FMLA leave is designated as appropriate under the FLSA in DOL regulations, 29 C.F.R. §541.602(b).

²⁶ 29 C.F.R. §541.603(b)-(c)

²⁷ 20 C.F.R. §541.603(d).

Steven L. Schwarzberg, Kerry A. Raleigh, and Larry A. Strauss of Schwarzberg & Associates, and **David I. Spector, Christopher S. Duke, Lorraine O'Hanlon Rogers, Arlene K. Kline, and Scott W. Atherton** of Akerman Senterfitt, all collaborated on the CLE presentation that formed the basis for this article. Rogers and Strauss edited the article.

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