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## Employment Law for Law Firms: Do the Shoemaker's Children Need New Shoes?, Part 2

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In the first part of this article published in the July/August issue, we covered basic labor and employment law issues that law firms may encounter in managing their employees. In this part, we discuss policies and training that will help law firms fulfill their legal responsibilities and effectively manage their employees.

### Policies and Training: A Two-pronged Shield for Employers

Policies and training are two very important pieces of your employment law defense. Like Sinatra used to sing, "You can't have one without the other." Employees generally must receive training on your policies if you want them to be effective. In a perfect world, employers would have all policies in place, distributed, and up-to-date, and have their employee training done on a regular basis. The reason policies and training are so important stems from the two U.S. Supreme Court decisions of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

Generally speaking, these cases provide that if an employer has its harassment policies in place and its employees trained, and it follows those policies when an employee complains about harassment, an employer may have an iron-clad defense to a harassment claim where the employee has suffered no tangible impact (like a firing or demotion). Suffice it to say that if a law firm does not have its policies in place and training conducted, it could be a sitting duck — unable to avail itself of these important defenses.

There are numerous policies that could be included in an employee handbook, but certain ones stand out as essential for law firms.

*Fire at Will:* Unless intended otherwise, ensure you have language in your handbook that preserves the at-will nature of the employment relationship, and that the relationship can be terminated at any time for any reason. The at-will employment doctrine would be applicable in Florida; it may differ with out-of-state employees.

*Zero Tolerance for Discrimination:* Have an antidiscrimination policy, including an effective and mandatory reporting procedure. Discrimination can be based upon an employee's membership in any protected class (e.g., gender, race, age, religion) and it could relate to any aspect of employment. The antidiscrimination policy should include a separate component describing and prohibiting harassment, which is a type of discrimination. The reporting procedure should clearly tell the employee whom to contact and how to file a complaint. The reporting procedure must be mandatory — ensure the language in the policy makes clear that employees *must* report any perceived discrimination, not "may" or "can" report such behavior. Additionally, policies instructing employees only to report incidents to their immediate supervisor are problematic — the supervisor could be their harasser. Include options for reporting harassment or discrimination to a human resources manager or a key executive.

*Keep it Confidential:* With lawyers charged with maintaining clients' confidences, it is especially important to have a confidentiality policy for your employees. A firm's nonlawyer staff may not appreciate the importance of such confidentiality, and might not consider the ramifications of talking about client matters — especially with "juicy" cases — outside the office. Your handbook should make clear that any discussion of confidential matters outside the office is strictly prohibited and can lead to termination. Be sure to

include a document confidentiality policy, as well. If staff or paralegals take work home, it could pose a minefield of problems.

*Internet Rules:* Have an Internet and e-mail use policy and ensure it stresses there is no expectation of privacy with any e-mail or Internet use on company computers. Basically, the computer systems, e-mails, and Internet access belong to the firm and the firm has the discretion to monitor the manner in which they are utilized. Some might elect to allow limited, personal use of employer computers on an employee's own time, especially given the number of hours lawyers and staff may spend at work, but the policy should note such use is subject to revocation if abused. Be mindful of the implications posed by remote access from your employees' personal computers, as these may be deemed an extension of your firm's network.

*Employee Acknowledgement:* Policies are meaningless without evidence they were distributed to employees and understood by them. Each employee handbook should contain a separate acknowledgement page and a signature line for the employee to sign. Employee acknowledgements should also repeat the at-will nature of the employment, and note that the employer has the right to make revisions to the handbook as necessary and pursuant to the law firm's discretion.

*Expand Your Focus:* Federal and state laws aren't the only ones governing the workplace, so be very mindful of local ordinances. Local communities often have ordinances governing the workplace — such as with the types of individuals protected from discrimination — which are much stricter than federal and state laws. For example, several Florida counties and municipalities include sexual orientation among their list of protected classes.<sup>1</sup>

*Don't Surf for Your Handbook:* If you are into collecting porcelain figurines of 18th century tuba players, you can probably find them on the Internet. Just don't use the Internet to find your employment policies. What you find online won't necessarily be tailored for Florida, might be outdated, or just plain wrong.

### **Managing Stormy Weather**

As firms in Miami learned in hurricanes Andrew and Rita and firms in New Orleans learned with Katrina, disasters pose crippling consequences in both infrastructure and confidentiality of client files. You may recall the images of glass windows of downtown Miami law firms' high-rise buildings blown out, their files sucked away with the winds. Firms need to address such infrastructure nightmares, as well as those involving their employees. The first step is having a hurricane preparedness plan in place.

Do not limit yourself to only preparing for hurricanes, however. Storms aren't the only woes which can cripple your firm. A fire, burst pipe, death of many employees (such as in an auto or airplane accident), or theft could have an equally devastating impact.

Your to-do list in drafting a disaster preparedness plan must also include reviewing document preservation and computer back-up protocols with your in-house technology support personnel or outside technology consultants. Also, be sure to check with your insurer to confirm that you have business interruption insurance. Consider getting it if you do not.

Effective communication is a key component of your plan. Your office may be closed due to the disaster, but your clients' offices may be unaffected (especially if they are out of the area). You do not want "Hey, We're Open & Associates" to be the ones helping your clients in their time of need while you are, literally, blowing in the wind. Let clients know ahead of time how to reach key personnel. This is especially easy to do in the case of a hurricane, where advance warning is provided. The same applies for employees. Employees should know what to do in the event of a disaster, from planning for it to checking in once the danger has passed. Be sure to establish a policy and articulate it. Review it with employees, add it to the employee handbook, and hand out a fresh copy when a disaster approaches and thereafter.

Another critical issue in the wake of a disaster is how to handle paying your employees. Something that sounds simple enough can become quite complex. What happens if your office is open one day, but closed the remaining four days of the week due to a disaster? Do you have to pay an exempt employee for the entire week? The simple answer: yes. The FLSA considers that exempt employees get paid not for the *quantity* of their work, but if they are performing work at all for that week — *i.e.*, for *any portion* of that week worked (there are some exceptions).

The FLSA makes clear how to handle nonexempt employees, as well. If an employee has performed work in that work week, you pay them for the amount of time worked. So in the above example, an employer must pay the exempt employee for the week; the *nonexempt* employee may get paid just for the one day worked.

Some employers may be tempted to be generous, and have a policy of paying employees in full in the event of a closure. A wiser option is to make such a decision discretionary, rather than firm policy. Why? There's a huge difference between paying your staff for a few days that the firm was closed, versus closure for an entire month or longer.

Once the office is open, you may face another thorny issue: The employee who is reluctant to return to

the office. Perhaps children are out of school or the employee thinks the roads are still too dangerous. Options? Florida is an at-will state, with some exceptions carved out, so you generally would have the right to terminate the employee. Alternatively, you don't have to pay the nonexempt employee; and under certain conditions, you may not have to pay the exempt employee either. Additionally, if your firm has a paid time off (PTO) policy, you could require an employee to use those days in lieu of not getting paid.

While some people might refuse to return to the office, others may be called to duty in the Armed Forces, as well as civilian-oriented disaster call-up groups (such as emergency responders and their support teams), whether service is involuntary or voluntary. The rights of such employees and employers are governed by the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>2</sup> Generally, an employer is entitled to 30 days notice. However, this is not always a requirement, as would be the case in the event of an emergency. The cumulative length of a leave is five years with a particular employer, with some exceptions (such as someone in a military specialty).

While the employee is out, the employer is not required to pay the employee. However, the employer must afford these individuals the same benefits given to others on leave — including seniority-based rights or health benefits. You do not have to allow the employee to join the health plan, but if he or she is already on it, you do have to afford that employee the same COBRA options that would be available to others. However, leave under 31 days entitles an employee to continued group health plan coverage under the same conditions as if the employee had continued work.

Such employees also have absolute reemployment rights, as long as they were not dishonorably discharged. Employees need to give their employer notice before being allowed to return to work. Such notice depends upon the length of their tour of duty: For 30 days to 180 days of leave, they are supposed to give notice within 14 days, for example. The notice increases for absences in excess of 180 days.

### **When the End Is Here**

To paraphrase, hell hath no fury as an employee scorned. It's doubtful you have ever heard of a terminated employee turning to his or her employer and saying, "I deserved to be fired. Thank you for firing me. I don't hold any grudges. I'm just surprised you didn't fire me sooner."

A terminated employee sometimes goes looking for a lawyer. Indeed, employee lawsuits are among the most prevalent being filed now. For instance, in the fourth quarter of 2007, 918 lawsuits were filed in the U.S. District Court for the Southern District of Florida, of which at least 38 percent were employee-related claims.<sup>3</sup> Given the plethora of such litigation, the importance of having a plan when terminating an employee, assessing the litigation risks, and taking steps to minimize exposure becomes all the more important.

The starting point for formulating your plan is attempting an amicable separation. One approach is to prepare a separation agreement, and provide the employee with a severance package. During the actual termination, focus on ending things the best you can — not exacerbating the situation by offering a litany of negative comments about how poor an employee the individual was. Simply stating, "This isn't working out; it is best we both move on" is generally effective. Although Florida is an at-will state in which an employer can terminate an employee at will, that doesn't mean you should always opt for that approach. Utilizing progressive discipline, and documenting each step along the way, can be helpful in managing terminations, because it can show the history of employer dissatisfaction leading up to the termination. Without such an approach, an employee lacks any insight of problems in performance. If, when fired, the employee thinks the rug got pulled out from under him or her, the employee may start to believe that there must have been an improper or illegal reason for being fired — perhaps a discriminatory reason.

Obviously, documenting the problems also serves as a means to attempt rehabilitation and offers the employee a guidepost by which to compare improvement. If no improvement comes, such documentation then serves to show you tried to address the situation before ultimately terminating the employee.

At termination, another reason for providing severance to the employee is obtaining an effective, legally enforceable release. With severance, you are paying some insurance and buying that release. If the employee thereafter attempts to assert various claims, at least you have a release. Additionally, if a lawyer sees the employee signed a release, there is a tendency to think perhaps it is not a case worth investing time.

Releases have their limitations, however — notably, with overtime compensation claims. There are only three general categories of exception where you can get a valid release for such claims:

After a Department of Labor investigation resulting in a payment by the employer, where the department has the employee sign the release;

Pursuant to a settlement agreement reached in pending litigation that receives court approval; or

In some jurisdictions, by paying the employee everything claimed or that which could be claimed.<sup>4</sup>

Even if the release proves unenforceable, it can still accomplish the task of having the employee admit to key points which could benefit an employer in litigation. For example, have the employee acknowledge in the release the total hours worked, the rate of pay, and so forth.

The release also has to be customized to the type of claims at issue. For example, releases of claims under the Age Discrimination in Employment Act (ADEA)<sup>5</sup> are very different from those under other federal and state statutes that govern discrimination. To be effective, releases of ADEA claims must provide the employee with 21 days to review the proposal, and seven days to rescind after signing it.<sup>6</sup> Thus, it is important not to pay the severance money until the eighth day after the release has been signed, thereby avoiding having to try to recover payment for a rescinded release.

Another danger with separation agreements and releases is “tender back” clauses. Some lawyers may be tempted to include language that requires funds be repaid if the employee violates certain terms in the release — disparagement is a common example. While it may be attractive to do so as a means of giving teeth to the release, such a requirement likely takes away the consideration for the agreement. If you haven’t actually given anything, then maybe the release you thought you obtained is now unenforceable. Some employers have the separation agreement specify a breakdown of the severance payment, detailing what portion goes to what aspect of the employee’s claims. This way, if there is a tender back or some other reason a portion of the money gets returned, the employee is still getting some payment — and thus, consideration — for the agreement.

### Some Final Thoughts

The workplace offers an abundance of opportunities for employers to misstep their way into a courtroom, and law firms are certainly not immune to tripping. While lawyers may be familiar with courtrooms, it is preferable to be there representing clients — not themselves and their own firms. Large or small, virtually every firm has at least one employee. Taking the time to size up your workplace, and making sure your policies and procedures are in compliance with the law will prove to be sound advice indeed.

<sup>1</sup> See Broward County Code of Ordinances, Art. II, §161/2-21; Code of Miami-Dade County, Art. I, §11A-1; Palm Beach County Code of Ordinances, Ord. No. 95-31; see also [www.municode.com/resources/code\\_list.asp?stateID=9](http://www.municode.com/resources/code_list.asp?stateID=9).

<sup>2</sup> 38 U.S.C. §4301, *et seq.*

<sup>3</sup> Based on a comprehensive review of new case filings in the U.S. District Court for the Southern District of Florida for the fourth quarter of 2007.

<sup>4</sup> See *Mackenzie v. Kindred Hospitals East, LLC*, 276 F. Supp. 2d 1211, 1217 (M.D. Fla. 2003).

<sup>5</sup> 29 U.S.C. §§621-634 (1967).

<sup>6</sup> 29 U.S.C. §626(f). In a case where multiple employees are separated as part of the same process, a longer period and detailed disclosures may be required.

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*This column is submitted on behalf of the Labor and Employment Law Section, Eric James Holshouser, chair, and Frank E. Brown, editor.*