Managing the Risks of Employment Practices

Acquiring the Competitive Edge

An educational resource from Schinnerer

Professional service firms face increasing exposures for claims related to their personnel management. In many cases, firms simply do not understand the laws that apply to their employment practices. And they do not appreciate the risks they create when they ignore their legal responsibilities as employers.

This publication

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Managing the Risks of Employment Practices

Professional service firms are businesses. And if a firm is more than a sole practitioner, there are bound to be personnel issues. Federal, state, and local laws and regulations govern how employers treat their employees in the workplace. Federal statutes affect different sized firms in different ways. Many state and local laws go even further in defining acceptable workplace behavior. All professional service firms should have competent legal counsel to assist them with the increasingly complex task of maneuvering through employment regulations. And firms should consider Employment Practices Liability Insurance (EPLI) to provide protection for costly claims arising out of allegations of wrongful employment actions.

Knowledgeable Management and Staff

It is vital for the business operations of a firm that all employees understand their responsibilities and rights. In employment law, there are few situations in which the actions of a firm in managing its personnel are deliberately illegal. There are many “gray” areas, often based on uninformed decisions. These “gray” areas can produce claims that are expensive to defend, result in significant financial obligations, and are destructive to the professional reputation of the firm. Clear communication and reasonable action could diffuse most possible claim scenarios. But the communication and action should comply with any applicable laws and rulings governing the rights of employees.

Legal Action

Effective personnel management training is essential to avoid employment litigation. This publication does not recommend specific courses of action. It is meant to increase awareness and sensitivity to the issues that affect each firm's viability. We describe employment scenarios that professional service firms might face. Federal, state and local laws can restrict the actions a firm may want to take in response to these scenarios. In addition to statutory requirements, employment actions need to consider: *tort law*—defamation and other related personal injuries; and *contract law*—for individual employment contracts.

Focused Organizational Structure

Firms must be aware of their responsibilities. There is no immunity from employment practices claims.

Professional service firms are unusual business operations. They tend to stress teamwork and a common effort to provide professional services. They often focus their organizational structure on achieving professional fulfillment and client satisfaction, but overlook the complexity of employment law. Not knowing the law can result in major problems; understanding the law can provide benefits.

Statutory and common law requirements placed on employers can be used to develop a superior work force. Obeying the law and acting in a reasonable and sensitive manner with your staff engenders loyalty because of your employees' appreciation of being treated fairly. Productivity can be enhanced because of your staff's freedom from an offensive or humiliating workplace. And creativity can be fostered because of the diversity sound employment practices produce.

"My partners and I have been successful. And we want to hire people just like us to continue that success. Can I choose people based on this goal?"

Hiring is the initial test of a firm's understanding of employment practices laws. From the first step of developing a well-defined position statement to the final introduction of a new employee into the firm's operations, there are many pitfalls that could result in hiring claims.

Legally protected classes: Federal, state and local laws establish classes of people who are protected from discriminatory employment practices. The protected classes include those based on race, color, religion, sex, age, disability, national origin, pregnancy and sexual orientation.

Special care should be taken with application forms; they are both a source of potential liability and the first in a series of documents that can assist firms in avoiding liability.

Selection: The selection process should focus on skills essential to the job. Effective, non-discriminatory programs share these four features:

- The formation of a complete position description that determines the skills and experience required.
- The screening and evaluation of candidates is conducted by firm representatives who have the necessary interviewing skills and training.
- The conduct of a fair selection process—in compliance with equal opportunity laws.
- The documentation of each interview is timely and objective.

The process of narrowing the field of potential applicants starts with a well-defined position description. The process should focus on the functions essential to the position. In any advertising or interviewing, only *bona fide* occupation qualifications and experience should be discussed.

"We spend a lot of time with clients. I want to know as much as I can about prospective employees, including their family history. What's wrong with this?"

Interviewing: The importance of proper interview techniques cannot be overemphasized. The key to properly structuring interviews is to focus entirely on job-related questions and criteria. While the law does not specifically forbid the asking of any other types of questions, any information gained that is not job-related must not be used in the selection process. Employment problems, claims of implied contract, misunderstanding of job requirements and claims of discrimination often trace back to poor interviews.

"I don't like smokers and think they are non-productive. And I am sure that smokers will drive up my health insurance costs. Can I tell people that if they smoke I won't hire them and if they start, they're history?"

Statutory and case law protect the rights of employees to have freedom in their personal lives. Employers have to be careful not to infringe upon lawful, outside activities.

Smoking: While many states and localities have enacted statutes that regulate smoking in the workplace, the clean air statutes and ordinances are the only treatment of the smoking issue. Over half of the states have enacted statutes that prohibit employment discrimination against smokers based on off-duty use of lawful products such as tobacco. In these states, it is unlawful to discharge or discriminate against any employee with respect to terms, conditions or privileges of employment, or to refuse to hire any prospective employee who smokes outside the workplace during non-working hours. Some of these statutes also expressly allow employers to make distinctions, for purposes of insurance coverages and insurance premium co-payments, based on whether or not the employee is a smoker.

"I have an unusual office floor plan and a small staff. I need everyone to perform their duties within their allocated space. How does the ADA apply to me?"

Accommodation of Disabilities: The Americans With Disabilities Act (ADA) sets forth broad prohibitions against discrimination on the basis of disability, both physical and mental. The ADA provides protection for any individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the position held or desired. Individuals who have a history of disability, who are perceived as being disabled, or who are associated with disabled individuals are also covered. The ADA employment requirements apply to firms with 15 or more employees.

Many firms see the ADA as affecting only their services to others. Federal and other laws also guide a firm's employment actions.

Disability discrimination under the ADA is one area of particular concern during the interview process. To avoid liability under the ADA in this instance, the interviewer should focus the interview on job requirements and job-related questions. Questions designed to elicit whether the applicant is disabled should be avoided. Obvious disabilities—or ones the applicant volunteers information about—should lead to a discussion of potential "reasonable accommodations." Questions, however, should be directly concerned with the applicant's ability to perform the essential functions of the job.

Sexual Harassment

"I think my new project manager has been making inappropriate comments to my receptionist. When she told me he was a "dirt-bag," I replied that we needed him for a new project and had to make him happy. Did I handle this properly?"

Sexual Harassment: Title VII of the Civil Rights Act of 1964 (amended in 1991) specifically prohibits employment discrimination based on sex. The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and verbal, visual and/or physical conduct of a sexual nature." These behaviors constitute sexual harassment when certain criteria are met, including if submission or rejection of such conduct is made either implicitly or explicitly a term or condition of employment. If this occurs, it is "quid pro quo," or conditional, sexual harassment.

Examples of sexual harassment also appear in the creation of a hostile work environment. Hostile environment sexual harassment creates an intimidating or offensive working environment for the employee. This could take such forms as *physical*, such as unwelcome touching, even if not intimate in nature; *verbal*, such as jokes, inappropriate comments or threats; or *visual*, such as pictures, gestures or staring.

To adequately prevent sexual harassment, a firm should have an effective training program that educates employees about their rights and the employer's commitment to a harassment-free working environment.

Courts have ruled that a plaintiff need not prove tangible economic or psychological damage to establish a case of hostile work environment harassment. The plaintiff need only establish that the conduct was so pervasive that a reasonable person would find it to be hostile or abusive. Firms should remind all employees about the firm's "no tolerance" policy for sexual harassment and reiterate the confidential procedures for reporting a situation.

"Some construction workers like to taunt design firm employees at the site. Am I responsible if a construction crew continually verbally abuses one of my employees?"

Hostile Work Environment: The creation of a hostile work environment extends to situations beyond the office. If an outside activity is employment-related—whether it is a visit to a construction site, an outside event conducted by the firm or even a game of golf with a client—the firm has a duty to its employees. Recently, courts have expanded hostile work environment liability to when a non-employee harasses an employee.

Employers may be liable in a hostile environment case where they had knowledge of such an instance and did not take immediate and adequate remedial action. If the employer should have discovered the existence of such offensive conditions, but failed to do so, it may be liable. Knowledge could be demonstrated by a complaint to management, by the pervasiveness of the harassment, or by evidence that the employer had deliberately turned its back on the problem by failing to establish a policy against it and a grievance mechanism for redress.

The "guys just being guys" observation is no excuse. Firms can neither create nor condone a hostile or abusive work environment. And remember, sexual harassment can include same sex harassment.

What constitutes immediate and appropriate corrective action also must be determined within the context of a specific case. Deliberate ignorance is no excuse and callous disregard is seen as ratification of the abuse.

Retaliation

"I don't want to offend clients by telling them that they have to work with someone when they tell me they prefer another employee. Can't I just move the person who is objectionable and find a more suitable match?"

Firms sometimes transfer an employee to please a client. The transfer request might be based solely on a discriminatory preference on the part of the client. Often, the client says that they "simply don't like" the employee.

Another scenario is when the client is abusive or harassing to an employee and the employee fears reporting the client. Employees often fear that reporting client behavior will result in retaliation against the employer by the client and ultimately retaliation by the employer toward the victim. A client can be in a relatively powerful position and employees often sense an obligation to tolerate abusive or discriminatory conduct.

Retaliation claims are often the basis of discrimination and wrongful termination litigation. Remember, a client preference is not an excuse for discrimination.

Transferring an employee does not work because it does not address the underlying problem. And the transfer can be seen as retaliatory. It may solve the problem temporarily with respect to a client but will not minimize the firm's liability. The potential liability will be increased because if the conduct recurs the firm will not have met its legal burden to ensure that offensive conduct ends.

Taking an employee away from an opportunity to perform simply because of a client's preference—including sexual harassment or violation of the employee's civil rights—is usually found to be illegal retaliation by the employer. Courts have ruled that the preference of a client as a *bona fide* occupational qualification is valid only if it "implicates the essence of the employer's business." If your business is providing professional services, the law will not protect you.

"Before I became registered, I worked sixty-hour weeks to show the firm I worked for that I cared about success and wanted to learn the business. Can I still make employees straight out of college serve such an apprenticeship?"

The Fair Labor Standards Act (FLSA) applies to all employers in the "stream of commerce." It sets minimum wage requirements and requirements for the payment of overtime to hourly employees. It does not restrict the hours of work, but it does force payments for overtime. Although there are exceptions to the requirements for overtime pay, it is unlikely that professionals who are not in decision-making positions will be automatically exempt from the overtime payment requirements.

Many states, and some cities, have wage and hour laws that provide greater protection than federal regulations. Firms, especially those that practice in more than one state, should check state and local laws.

Paying an employee on a salary basis meets one of the standards for exempt treatment. But declaring an employee a "salaried professional" may not be enough. Their duties may not qualify them for an exemption from the FLSA. Intern positions, for example, must be carefully analyzed before the position can be safely treated as exempt.

This issue may be cleared up by either presidential authority through an Executive Order or through legislation. Until the law is clarified, care should be taken to proper classify employees and pay them for overtime worked. A willful violation of the FLSA not only requires the payment of back wages but may create liability for liquidated or double damages and civil penalties.

Family and Medical Leave Act

"One of my project engineers wants time off to care for an adopted child. He wants to take off six months. If he wants six months off, I think he should find another job. I can't afford to hire and train an employee who knows that six months later the job may be gone."

Under the federal Family and Medical Leave Act, companies with 50 or more employees are required to provide up to 12 weeks of unpaid leave for medical reasons, the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. During this time, the employee's health benefits must be maintained. Leave under the Act is available to both men and women who have been employed at least 12 months and have worked at least 1,250 hours during that period. The time off benefit under this Act can be applied annually. Thus, the time can be taken both at the end of a year and the beginning of the next. Some states have similar laws. But if the state law provides a longer time, the state law prevails.The time off under the state and federal laws, however, cannot be combined.

The Family and Medical Leave Act and similar state laws apply equally to men and women.

There are constraints to the Act. The employer can require that accrued vacation, personal or family leave be used first. The childcare provision cannot be divided up without the employer's agreement. Thirty-days' notice must be given for foreseeable events. And if the employee needs intermittent leave for medical purposes, the employee may be assigned on a temporary basis to another job as long as the pay and benefits are equivalent. Federal law allows the denial of leave for "key" employees if their absences would cause "substantial and grievous economic injury."

"A project is ending and I need to cut staff. One employee I would normally release just announced she is pregnant. Does the fact that she announced she is pregnant mean I cannot let her go?"

Having economic or performance-based justification for terminating employees usually protects managerial decisions.

The safest way to terminate an employee is to be sure that you have a valid, non-discriminatory business reason for the action—and enough documentation to prove your case. Your documentation must be created in the normal course of business, before you terminate. Reconstructing documentation, such as poor performance reviews, after the fact is incriminating. Selective documentation, such as building a case against one worker when others having similar situations did not have their actions recorded, may prove that a person was the victim of discrimination.

"As I downsize my office, I want to keep the best people. While some of the best people are older and more experienced, they are too expensive. How can I get rid of the higher-paid older workers?"

Courts are also addressing the practice of providing additional benefits to older employees to encourage them to leave. Reverse age discrimination may be a new exposure.

Age Discrimination: The Age Discrimination and Employment Act of 1967 prohibits age discrimination against any employee aged 40 or over. Age discrimination lawsuits are on the rise because of economic pressures on employers to downsize their work force.

Voluntary Terminations: Just because an employee quits, an employer is not freed from potential liability for wrongful termination. If the work environment was such that it might seem reasonable to a jury that the employee was compelled to quit, an employer can be found responsible for harassment, discrimination or constructive discharge. In all voluntary termination cases, the employee should submit a resignation letter and the employer should confirm the resignation in writing, summarizing all benefits issues and any payments to which the employee may be entitled.

Prompted Resignations: A "prompted resignation" is one that appears to be a voluntary event though the motivation for the employee to resign came from someone else. In some cases, the employee wants to resign rather than be dismissed. Or, a firm may offer an employee the opportunity to resign. In general, it is better for the firm if the employee resigns, but for internal record keeping, the prompted resignation should be treated as if it were a firing.

Involuntary Terminations: All involuntary terminations must be able to withstand intense scrutiny. Before an employee is terminated for any reason, the problem should be documented using established policies and procedures. Poor performance or behavior problems should be thoroughly detailed in the employee's personnel file. Records should be reviewed and an assessment made as to the appropriateness of the proposed discharge.

Some firms use an outside consultant to assess employee performance and compatibility with firm needs as a prelude to work force reductions.

Work Force Reductions: When economic reasons demand that positions be eliminated, a sound business reason exists for subsequent terminations. In most firms, layoffs are made to keep the business going. Those whose jobs are most essential or performance is most productive will be kept. Any time is it is possible, retirements and attrition are preferable to involuntary layoffs.

When layoffs are unavoidable, special attention must be paid to disparate impact on older members of the work force or on any other protected class. Any reduction in force should proceed from the initial financial analysis that requires the reduction, through an objective job functional analysis, to the decisions regarding which jobs can be eliminated.

Federal Laws Affecting Employment Practices by Size of Firm

1 to 14 employees:
Civil Rights Act of 1866 (Section 1981); Federal Insurance Contributions Act of 1935 (FICA/Social Security); National Labor Relations act (NLRA) (1935); Fair Labor Standards Act (FLSA) (1938); Labor-Management Relations Act (Taft-Hartley) (1947); Equal Pay Act of 1963; Consumer Credit Protection Act of 1968; Occupational Safety and Health Act (1970); Fair Credit Reporting Act (1970); Uniform Guidelines of Employee Selection Procedures (1978); Employee Polygraph Protection Act (1988); Uniformed Services Employment & Re-employment Rights Act of 1994
(If company offers benefits):
Employee Retirement Income Security Act (ERISA) (1972); Health Insurance Portability and Accountability Act (HIPAA) of 1996

15 to 19 employees, add:
Civil Rights Acts of 1964; Title VII, Civil Rights Act of 1991

20 to 49 employees, add:
Age Discrimination in Employment Act (ADEA) (1967); Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

50 or more employees, add:
Family and Medical Leave Act of 1993 (FMLA); EEO-1 Annual Reporting (if a federal contractor)

100 or more employees, add:
Worker Adjustment and Retraining Notification Act of 1989 (WARN); EEO-1 Annual Reporting (if not a federal contractor)

Firms that are federal contractors:
Davis Bacon Act of 1931; Copeland Act of 1934; Walsh-Healy Act of 1936; Service Contract Act (1965); Executive Order 11246 (Equal Employment Opportunity/Federal Contractors) (1965); Executive Order 11375 (Gender Discrimination/Federal Contractors) (1967); Executive Order 11478 (Affirmative Action) (1969); Vocational Rehabilitation Act of 1973; Vietnam-Era Veterans Readjustment Act of 1974; Drug Free Workplace Act of 1988

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