

LAWYERS AS EMPLOYERS: TOP FIVE MANAGEMENT MISTAKES TO AVOID

by TODD R. WULFFSON

Regardless of the size of a law firm, two things are almost always true: (1) you need clients; and (2) you need employees (unless you force family members into indentured servitude). Most lawyers excel at attracting and retaining the first group, but often fail miserably with the second. Considering that employees at a law firm tend to be well-educated, confident, and know something about the law (or where to look things up), the law firm that ignores its employee relations will be lucky to last as long as *L.A. Law* did on television.

Here are five areas where law firms get into perpetual, but completely avoidable, trouble.

1. Invest a Little Time Learning About the Applicable Laws

You don't need to become an employment law maven (although it may behoove you to

Leave Act (FMLA) or the California Family Rights Act (CFRA), but if you have more than five employees, your pregnant employees can take up to four months off (unpaid) for pregnancy disability leave under the Fair Employment and Housing Act (FEHA). Their jobs are guaranteed upon their return, so this is an important issue.

Learn the basics of reasonable accommodation under the FEHA and the federal Americans with Disabilities Act (ADA), and understand that if an employee comes to you and says, "I have glaucoma and need to smoke weed twice a week for the pain—you'll accommodate me, right?" that the proper response is *not* to say, "You're fired," but instead, say, "We will always reasonably accommodate any medical condition or disability, but a reasonable accommodation will never include being under the influence of any illegal drug at work, including mari-

a workday or forty in a workweek. You can also have all the right posters up in the office, but if you ask your secretary to work through lunch on a filing, you need to pay him or her for the time worked, as well as an extra hour of pay as a penalty for missing lunch. This one might really bother some: you can hire a brand new lawyer and pay them \$100,000 their first year as a share of the firm's profits, but if they aren't paid a regular salary of at least double minimum wage, they can wait three years and sue you for all the overtime you didn't pay them and all the lunch and rest periods they didn't take.

2. Have the Right Documents in Place

One cannot get through law school or work in law firms for any length of time and not secretly find comfort in documents. Get a good offer letter template that sets forth the terms of employment, and make sure

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have one as a friend), but knowing the basics of California employment laws is in your best interest (face it—but for the weather, no one would *choose* to have a business in California). Learn what constitutes a "protected category" under federal and state law, what constitutes an "adverse employment action," what you are prohibited from asking in an interview, and how to handle a complaint of discrimination or harassment.

Understand that if you have fewer than fifty employees, your business is not required to grant leaves under the Family Medical

juana" (marijuana, by the way, is still illegal in every state in the union according to federal law).

Know the basics of wage and hour laws—both the federal Fair Labor Standards Act (FLSA) and the state Industrial Welfare Commission, Wage Order 4. For example, if your secretary spends more than half of the day processing letters and filings, you can call them the "Office Manager" or "Office Czar," but they still won't be exempt from overtime, and you will need to pay time-and-a-half for all hours worked over eight in

you include an "at-will" provision, meaning that either the firm or the employee can terminate the employment relationship at any time, with or without notice and with or without cause. Also, develop a good employee handbook (and keep it current) that contains all the required policies for a California employer, as well as the ones that show how great of an employer you are, such as vacation, maternity/paternity leave, and tuition reimbursement for those who want to improve their skills. The handbook should also contain policies that will specifi-



cally allow you to avoid litigation down the road, such as an internal grievance policy, a cell phone policy (never use while driving), anti-harassment policy, and a social media policy that covers off-duty use by employees. Have an Acknowledgement of Receipt at the end of the handbook that is signed by each employee and retained in their personnel file (that's also another good place to restate the at-will employment policy).

Consistently (perhaps the most important HR word for all employers to know) maintain performance evaluations and documentation of discipline. If it is months or years down the road, and you need to defend a disciplinary action you took, a jury is not going to understand why a law firm did not maintain comprehensive written records.

Understand that if you employ independent contractors, the contract you create is nice, but it may not matter much if the contract lawyer or paralegal works only for you, at your office, and is going on his or her third year with your firm. Like most other legal issues, it's not what you call a document that matters, it's whether the language reflects the reality of the situation. If your "independent contractors" are not "independent," then the artfully worded agreement is almost worthless.

3. Do a Background Check on Every Employee

In order to comply with the various "ban the box" initiatives, as well as to avoid potential "failure to hire" discrimination claims, tell all applicants that if they receive an offer of employment, a comprehensive background check will be required before they start working that includes a criminal records check, a credit check (permissible for most employees in a law firm), a social media check (for anyone that could affect the reputation of the firm, such as attorneys), and contacting all references. Such a notice to applicants will likely eliminate many who know they would not pass, without your spending any money or risking a lawsuit for failure to give them an offer. Once you have your candidate selected, provide him or her with the appropriate releases, and then make sure you actually run all those background screens. Make sure that you treat all similarly situated employees the same: so, run a criminal records check on the new lateral associate as well as the lateral partner who is allegedly bringing a \$2M book of business.

An area that law firms tend to overlook

is the social media check. If you are hiring a lawyer to work for your criminal defense firm, you want to know in advance if he or she has been frequently blogging about the virtues of the Securities and Exchange Commission, and how we need more federal watchdogs to stem insider trading and other stock crimes. You also may want to know if there are pictures of your new associate sucking down a beer bong at a rave in Palm Springs last year; after all, your prospective clients may find it when you send an email setting up the initial client meeting. It is very important to make sure that all social media checks are done consistently and properly (*i.e.* post-offer, pre-employment) because you can learn a great deal about an applicant from social media that might otherwise be problematic if you had not already decided to hire them.

It may sound obvious, but make sure you confirm that any lawyer you hire has a license in good standing with the State Bar. It is often surprising how law firms are proficient at clearing conflicts for new attorneys, but then they fail to confirm that the lawyer has not been disciplined by the Bar, or even that their license is still valid.

4. Have a Zero-Tolerance Policy for Drugs, Discrimination, and Harassment

Even though law firms sometimes act like they are above the law, the reality is that they are held to a higher standard by juries than non-legal employers, particularly when it comes to things like harassment and workplace drug use. Your employee handbook should explain that illegal drug use (including marijuana and THC products) is never allowed in the office or at firm events, and that alcohol is limited to firm-sanctioned events that occur only in a controlled environment. You should also state that if the firm has "reasonable suspicion" an employee is under the influence, it can require that employee to be tested by a certified lab. Random drug testing is illegal in a law firm, so don't threaten it in the handbook.

With respect to complaints of discrimination or harassment, have a clearly communicated and consistently enforced policy regarding how these complaints are handled. One person should be designated to receive all complaints, and someone else if the complaint is about the designee. Avoid advising employees to complain to "any partner" because you want to make sure all complaints are handled the same way; different

lawyers have different reactions and abilities when it comes to dealing with a complaint of discrimination or harassment. All complaints should be investigated promptly and as confidentially as possible. Make sure you follow up with the complaining party about the results of the investigation, and later to make sure there is no retaliatory conduct occurring as a result of the investigation.

5. Retain the Services of a Human Resources Professional

If you cannot justify the expense of a full-time HR professional, at least have an experienced person available on an as-needed basis. You need to focus on running your firm, and HR issues are too important to leave to someone who is not trained and experienced. Your HR professional can ensure that your training and posters are all handled properly, that your handbook stays current, that you are complying with all wage and hour laws, and that hiring and firing decisions are done consistently and in compliance with applicable laws. It is also ideal to have your HR person designated as the point person for all complaints and employee relations issues. Many employment issues involve as much psychology as they do legal compliance, which is all the more reason to have a trained person handling them.

Following consistent and current procedures in the above five areas of running your business will allow you to spend more time generating business, and less time defending employment claims against your firm.



Todd R. Wulffson is managing partner in the Orange County office of Carothers DiSante & Freudenberger LLP, a leading California employment, labor, and business immigration law firm providing litigation defense and counseling to California employers. Todd may be contacted at twulffson@cdflaborlaw.com.

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