Fairness, Documentation Protect Against Claims

Wage-hour class action lawsuits are the top legal issue that companies face in the United States.

BY DAMIAN McNAMARA
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MIAMI — Minimizing exposure to employee lawsuits—including sexual harassment and discrimination claims—begins with hiring the right employee for your office, according to Chad K. Lang.

Fairness and consistency are important. Always treat one office assistant to the same raises, benefits, and time off as another. "Doctors' offices are small, and there are no secrets," said Mr. Lang, a labor and employee attorney practicing in Miami.

"I am here to help you deal with a commodity you deal with every day—your employees," Mr. Lang said at a pediatric update sponsored by Miami Children's Hospital. "They can be your greatest asset or your greatest nightmare."

Laws concerning labor and employment are about much more than worker's compensation. The only law that may not apply to a small practitioner is the Family and Medical Leave Act, which only applies to staff with a minimum of 50 employees. Although federal law generally applies to firms or practices with 15 or more employees, discrimination law applies to those with only 5.

Prevention is the best strategy. Mr. Lang recommends that you look under a microscope at every employment decision you make. He estimated that about 90% of all employee disputes are caused by 10% of employees.

Avoid general employment application forms; customize one with questions relevant to work in a medical practice, he said. Also, train interviewers to spot facial expressions that indicate lying or shading of the truth. "What if you find out 6 months later someone you hired was jailed for embezzlement? You need to know enough about employment law so you can recognize a red flag and know [when] to call someone to help."

Fairness, documentation, and consistency—"those three words can win a lawsuit," Mr. Lang continued.

There cannot be discrimination if a physician treats all employees the same. "But if you give one person a $10,000 raise and the other a $5,000 raise … everyone will know about it. When that person leaves, whether [they leave] voluntarily or not, they sue," Mr. Lang said. "And most attorneys work on a contingency fee, so there is no cost to the employee."

Wage-hour audits are another fairness issue. "You need to have someone figure out if you are treating your employees correctly. Are they truly exempt from overtime?" Mr. Lang said. "Let's say you pay someone $60,000 per year. Are they entitled to overtime? It depends on their job description."

Wage-hour audits are the No. 1 legal issue that companies face in the United States, Mr. Lang said. Beginning in 2001, the number of wage-hour class action lawsuits surpassed the number of class actions for race, sex, national origin, color, religion, and age in federal courts—combined.

Mr. Lang also addressed the perils of dating in the workplace. "I have three sexual harassment cases now based solely on a supervisor dating a subordinate," he said. "What do you think a subordinate employee will do if they are fired? They will sue, and most likely they will win."

Some employers have policies that address dating in the workplace. "What has recently become a trend that I cannot believe is a 'love contract,' " Mr. Lang said. Some companies allow workers to date but they have to inform the employer when a relationship develops. Also, they are required to sign a contract stating that they are not being coerced.

Once a year, hire an expert to train your office managers about harassment and discrimination, Mr. Lang suggested. "Why? It's an insurance policy," he said.

An employee handbook with a specific process for making sexual harassment complaints is recommended. Complaints should be made to at least two people—one of each gender—listed in the handbook by job title instead of name. This will ensure that an employee has someone to talk with besides the person doing the alleged harassment.

A meeting attendee asked Mr. Lang about his fees. "I charge about $2,000-$2,500 to develop a new handbook or revise one. A 3-hour training once a year costs about $1,000," Mr. Lang said. His rates as a law firm partner range from $250/hour to $350/hour. He also has trained associates who charge less per hour for consultation.

Another element of legal protection is, not surprisingly, "documentation, documentation, documentation," Mr. Lang said. "But do not write down anything you do not want someone to read. This sounds like something your grandmother would tell you."

Never assume your e-mail, text message, or instant message (IM) is not going to be exhibit No. 1 in a lawsuit, Mr. Lang said. "Good employment lawyers have great experts that will get e-mails and IMs. Do not assume they are gone after you delete them."

Mr. Lang's last piece of advice was "know a good employment lawyer." ■

'Progressive Discipline' System Provides Lawsuit Safeguard

BY DAMIAN McNAMARA
Miami Bureau

MIAMI — A "progressive discipline" system of warnings and suggestions for improvement before firing an underperforming employee maximizes chances of winning a wrongful termination lawsuit, according to a labor and employee attorney.

In addition, perform regular and honest performance evaluations and keep all employee documents under lock and key. "I suggest to my clients that they do not fire someone until there is enough of a paper trail," said Chad K. Lang, a labor and employee attorney practicing in Miami.

"Progressive discipline … is about fairness. The No. 1 reason employees file lawsuits is they believe they were not treated fairly, regardless of how many warnings you gave them. They truly believe they are right," Mr. Lang said. There is no legal requirement for progressive discipline, but it will look "very fair to a jury." It will be perceived as, "We gave them benefit of the doubt, they chose not to listen, and we had to let them go."

Avoid oral warnings about performance, Mr. Lang said. But if an initial warning is spoken, document it in writing afterward. Write, for example, I met with him on this date, we discussed this, and this is what I asked him to improve. E-mail is acceptable. For example, send an e-mail stating, "Thank you for meeting with me today. This is what we discussed."

Subsequent warnings are more formal and always should be in writing, Mr. Lang said at a pediatric update sponsored by Miami Children's Hospital.

Have a witness in the room when presenting an employee with a written performance warning, Mr. Lang suggested. "A lot of people do these in a closed-door situation." The presence of a manager or supervisor is recommended, preferably one of the same gender as the employee in question to avoid allegations of sexual harassment before termination.

Link the written warning to prior oral discussions and require the employee to sign and date it. "A lot of times, people remember the signature but forget to date it," Mr. Lang said. "They might countersue and say they signed it at different time." If an employee refuses to sign the written warning, note this, sign and date it, and have witness do the same. "The witness does not need to say a word. They are observers, so if it comes down to it, it does not become a 'he said, she said' situation."

Employees also should sign an employee handbook acknowledgment form, Mr. Lang said. "An employee will most likely lie and say [she] never received it."

A written company policy should state that these progressive steps are a guideline and, in some instances, there will be immediate termination, Mr. Lang said. The employee handbook should include an "at-will" employee policy. This implies there is no contract for you to keep them.

Honest, written performance evaluations for all employees are another protection against a future lawsuit, Mr. Lang said. "A lukewarm evaluation will not help if you fire them for doing a poor job. If you are going to take the time to do these, tell the truth and be accurate."

Many employers tie evaluation scores to salary and bonus pay. It will look inconsistent to a judge or jury, however, if an underperformer gets the same raise as another employee doing well. "If it goes to disposition, they will ask why you gave an underperformer a raise in the first place, and then why was it equal to someone you did not fire," Mr. Lang said.

Praise and criticism are not mutually exclusive. Recognize tasks they are doing well in their performance evaluations, Mr. Lang said. Use objective criteria and standards when possible, and include an improvement plan for underperformers. It can state, for example, that within 30 days or 60 days they have 'X' and 'Y' to do. "Improvement plans are good and they are objective."

In addition, "I highly recommend you keep the documents under lock and key," Mr. Lang said. Often, employees know when their firing is coming, and, a day or 2 beforehand their personnel files miraculously disappear.

A final piece of advice is to have a specific document retention strategy in your office policies, Mr. Lang said. "This is where lawsuits are won and lost nowadays." It is advantageous, for example, to state that all e-mail messages are automatically deleted after 6 months or 1 year. Otherwise, a judge or jury can deem failure to preserve electronic records "willful spoliation." "Adverse jury inference instructs the jury to assume the spoliation of documents presumes they were harmful to the defendant's case." ■