

BURR ARTICLE

Top 10 Bank Hidden Employment Issues

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Demographic market concentration trends, regulatory changes, and business condition developments raise legal issues your bank's lawyer may not be aware of; here are my top ten:

10. Reconsider arbitration policy application; Dodd Frank changes to SOX whistle-blowing may make it less attractive to have such a policy for middle management whose most attractive claims often will be this kind of action, Pub. L. No. 111-203, 124 Stat. 1376, 1746, 1848 (codified as amended at 7 U.S.C. § 26(n) and 18 U.S.C. § 1514A(e)), and recent Supreme Court decisions allowing a proper arbitration policy to eliminate class and collective actions may make it more attractive to focus one on tellers and other non-exempt employees. See American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (June 20, 2013).
9. Audit stock option distribution; criteria may not survive glass ceiling OFCCP review or discrimination law scrutiny. See, e.g., Velez v. Novartis Pharm. Corp., 04-9194 (S.D.N.Y. 2010) (settling discrimination and equal pay claims over stock options and other forms of compensation that allegedly favored men for \$175 million).
8. Assess who has noncompetes and who needs them; loan underwriters and middle managers performing IT services often have skills and/or information useful to competitors, and creating necessary protection during litigation from confidentiality agreements or policies is not easy.
7. Review social media policy; evaluate whether restrictions on "defamatory content," use of bank logo, disclosure of "confidential" information, prior permission and reporting obligations, and criticism of managerial employees could result in discharged violators being reinstated with backpay by an agency completely foreign to most bank HR departments. See, e.g., Rules on Using Social Media Technology and on Communicating Confidential Information Are Overbroad, available at <http://www.nlr.gov/news/acting-general-counsel-releases-report-employer-social-media-policies>; see also Hispanics United of Buffalo, Inc., 03-CA-027872 (NLRB Dec. 14, 2012); Dish Network Corp., 2012 WL 5564372 (NLRB 2012).
6. Check exempt status of trainees, IT people, and lead tellers; and ensure an effective means of confirming an uninterrupted lunch break each day for each non-exempt employee. These simple steps may avert an FLSA collective action. See, e.g., Lindsay v. Wells Fargo Advisors, LLC, 4:12-cv-00577 (E.D. Miss. August 5, 2013) (approving \$4 million settlement of collective action with thousands of employees over unpaid overtime dispute under the FLSA); Yuzary v. HSBC Bank

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USA, N.A., 1:12-cv-03693 (S.D.N.Y. 2012) (settling overtime claims by bankers, managers, and specialists for \$15.6 million).

5. Evaluate diversity requirements, benefits, and employee investigation procedure impacts of foreign nationals working here and American nationals working abroad; European countries have laws affecting affirmative action (respecting board composition and race and sex disclosure), strict privacy laws that impact employee investigations in the electronic age (e.g., transoceanic harassing emails from bank devices), and generous benefit laws (e.g., severance and retirement) that can impact banks' foreign and expat employees in unexpected ways. See, e.g., Wendi S. Lazar, EMPLOYMENT AGREEMENTS AND CROSS BORDER EMPLOYMENT--CONFIDENTIALITY, TRADE SECRET, AND OTHER RESTRICTIVE COVENANTS IN A GLOBAL ECONOMY, 24 Lab. Law. 195 (2008).
4. Pre-manage employee litigation potential through decision planning to limit potential witnesses to those who will know the rules and can explain the facts with minimal disruption; identify, designate and train the employment decision-makers whose testimony can win the case without paralyzing the operation.
3. Anticipate downsizing due to acquisition and business circumstances by creating contingency and succession plans, and including limiting documentation; a more concentrated market and an aging white collar baby boomer workforce combine for serious potential liability from sources as varied as state and federal age discrimination laws and the unintended creation of an implied severance pay plan.
2. Your facility can survive the new Alabama gun law; read out alert [here](#) to learn how remote or secure parking facilities and rules respecting company vehicles can protect your facility. See Ala. Code § 13A-11-75 (new amendments in effect August 1, 2013).
1. Your institution (regardless of size) can suffer greatly from harassment or other discriminatory liability if direct reports to middle and upper management are not periodically the subject of HR audits; single cases have crippled banks of all sizes. See Turnley v. Banc of America, 576 F. Supp. 2d 204 (D. Mass. 2008) (ending in a \$7.2 million settlement on discrimination claims by employees); Machen v. Childersburg Bancorp., Inc., 761 So.2d 981 (Ala. 1999)(smaller bank faced significant liability for taking inadequate steps against misbehaving executive).

If you are not aware of these issues, you should be. Take a few minutes with employment lawyers who defend and advise banks of all sizes respecting each of these issues, and determine how best to manage these challenges before they manage you.

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