

# Staying out of court

How to avoid costly employment litigation **Interviewed by Adam Burroughs**

**E**mployment litigation is on the rise, especially in California, as an increasing number of pro-employee regulations can trap unwary employers.

"Litigation is expensive, and the consequences of not understanding employment laws can be severe," says Laura Fleming, Shareholder in Stradling Yocca Carlson & Rauth's Labor and Employment Practice Group. "In addition, being embroiled in a lawsuit can be distracting and can negatively impact employee morale. It makes good business sense to prevent employment litigation to the extent possible."

*Smart Business* spoke with Fleming about five strategies that can help you avoid costly employment litigation.

## What role does a company's human resources department play in preventing litigation?

It is very important to invest in your human resources department. HR functions can be technical, and even counterintuitive. The executive team should be free to focus on the business goals of the company; they should not have to personally handle HR issues on a day-to-day basis.

Ideally, companies should have dedicated HR professionals with experience and training. I encourage employers to pay for membership in local human resources associations, which can provide ongoing training on new regulations to their HR staff. Also, make sure the HR department has access to employment counsel. A short phone call up front is much less expensive than heated litigation later.

For smaller businesses with limited funds, outsourcing is an option. For example, your payroll company might have human resources support available.

## How can termination of an employee get a company in trouble?

Termination can be a trigger for litigation. If you're going to fire somebody, it should not be done rashly. Managers may send the employee home, or place the employee on administrative leave pending investigation, never fire an employee on the spot. Always consult with HR, and possibly employment counsel, depending on whether the termination is high risk. For example, a company may consider terminating an employee having performance problems. That employee may then come in with a doctor's note requesting accommodations, or make a complaint about harassment or discrimination. Even where the employee is simply trying to avoid termination — perhaps



**Laura Fleming**  
Shareholder  
Labor and Employment Practice Group  
Stradling Yocca Carlson & Rauth

especially when he or she is doing so — the termination has now become high risk. It is the job of HR and employment counsel to reduce that risk. You can still hold the employee accountable for performance. However, make sure everything is well documented before you terminate. It could take weeks or months to get all of the pieces into place, but patience generally pays off in lowering the risk of litigation.

## How can offering severance help decrease the risk of litigation?

Severance pay is an insurance policy against litigation. In exchange for it, the employee should be required to sign a release waiving all claims against the company. Being a little more generous with severance pay can encourage employees to take the deal. It can also help them think kindly of you when they leave.

## How important is it that companies properly classify employees?

Whether employees should be hourly/non-exempt, or salaried/exempt is a tricky issue with huge litigation potential. With hourly employees, you must pay overtime, keep time sheets and provide meal and rest periods. Salaried employees receive the same wage regardless of how much they work per day.

There are limited number of categories of employees who may be paid on a salary basis. Employers who are not familiar with these should review them with an HR professional or counsel. At the same time, employers can pay anyone by the hour, so when in doubt, classify employees as hourly nonexempt.

Incorrectly classifying an employee as salaried can bring penalties including back overtime pay, meal and rest period premiums, and penalties for paperwork violations. Some employees may want to be paid on salary for flexibility, but if the position does not meet the legal criteria for exemption, don't take the risk.

## What are the litigation risks of social media activities?

Most employees are on social media. The 'millennial' generation is especially prone to blurring the line between personal and professional communications. Employers may search public websites to gather information on potential hires, but be careful. Certain activities on social media are protected and unlawful to use in an employment decision. Race, religion, disability status, gender and sexual orientation are protected categories, and it is a violation of the law to use this information to discriminate against applicants.

Once applicants become employees, they have even greater rights with regard to social media activities. Many employers don't realize that the National Labor Relations Act protects employees who discuss or complain about working conditions, even if they are not union members. Protection extends to employees who use social media to discuss their jobs, or their supervisors, with co-workers. As a result, a company that disciplines or fires an employee for such action could find itself in trouble with the National Labor Relations Board.

Companies should avoid 'spying' on the social media activities of their employees and should never attempt to 'hack' into an employee's private, password-protected site. Nonetheless, there are social media activities that an employer must address, including disclosure of confidential information and misuse of intellectual property. In addition, if an employee is using social media to sexually harass a colleague, and that is impacting the work environment, the company has a duty to respond. If an employee's activities do not impact the business, I would recommend turning a blind eye. <<

**LAURA FLEMING** is a Shareholder in Stradling Yocca Carlson & Rauth's Labor and Employment Practice Group. Reach her at (949) 725-4231 or lfleming@sycr.com.