

# THE HR PROFESSIONAL AND THE EMPLOYMENT LAW ATTORNEY: A MATCH MADE IN HEAVEN? (PART I)

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Selecting the wrong employment attorney for your company or failing to know when to use an attorney can have disastrous consequences for an employer. Employment laws in California change rapidly. Courts and agencies issue new legal opinions that apply to employers every day, sometimes expanding on an existing law and occasionally even completely overturning prior law. As a result, even the most informed employer needs help from an experienced employment lawyer. Although you can handle many employment matters on your own, some issues are particularly tricky and require legal expertise. When you consider that almost any employment law claim that an employee brings in California entitles the employee to not only damages but also attorney's fees (regardless of how small the damage victory was), it's easy to see why every employer, regardless of size, should have a relationship with experienced employment counsel.

## PROFESSIONALS

Kelly O. Scott

## PRACTICE AREAS

Employment

## Hiring An Employment Attorney: The WHY And The WHEN

### A. Hire Support, Not A Crutch.

An employment attorney is the legal support for an HR professional and an employer. An employment law attorney should not be used as a crutch in every employment related situation and with every employment related document. This would be too expensive for the employer, would undermine the on-site judgment and authority of the HR professional and is often not fast or organic enough to respond to the everyday situations of a workplace.

Similarly, an employment attorney need not be used for the routine hiring, firing, and processing of employees, especially during the application, recruiting, interviewing and initial enrollment of an employee. There is also generally no need to involve employment attorneys for routine payroll administration, personnel file maintenance and updates and other routine matters that recur for the workforce generally.

## **B. Bad Legal Documents Are Worse Than No Legal Documents!**

A document does not have to come from a lawyer for it to be a legal document. Employers are often surprised that the following items are legal documents: employment agreements and employment offer letters; handbooks and policies; arbitration agreements; severance agreements; employment applications; confidentiality agreements and non-solicitation agreements; and invention assignment agreements. In short, if it's called an "Agreement", then it's a legal document and should be prepared, or at least reviewed, by an attorney! Whether it's called an agreement or not, a written document from an employer to an employee is treated like a promise of how an employer will deal with a given situation. Accordingly, it is critical to have an attorney prepare, or at least periodically review, all employment documents.

An experienced attorney can and should: troubleshoot and edit flawed documents; ensure that all the pertinent legal terms are contained in agreements and would be enforced by a court; advise an employer on the proper circumstance and timing for using certain documents; recommend new or different ways of accomplishing the employer's goal in a given situation; and alert the employer to language that may create unintended obligations. Remember: one size does not fit all! Documents that are borrowed or inherited from a related non-California company or an unrelated business are probably not going to comply with California law and should be reviewed to make them compliant. Have forms periodically reviewed and updated with an attorney to make sure they are still valid.

## **C. Good Legal Strategy Saves Money While No Legal Strategy Is VERY Expensive For An Employer!**

Whether you believe you are dealing with a litigious employee or not, consider getting legal advice before firing an employee for misconduct, performance problems, or other bad behavior, especially if it has not been previously documented in the employee's file. An experienced lawyer can tell you not only whether terminating the worker will be legal, but also what steps you can take to minimize the risk of a lawsuit.

You must consult with an attorney in the following rare situations:

- you are planning to lay off a large number of workers or let go an entire department;
  - you decide you will not be renewing your Collective Bargaining Agreement with a union;
  - you want to change your pension plan, discontinue an employee benefit, or reduce vacation accrual;
  - a claim of harassment or discrimination has been made against an officer or owner of the company;
  - you are changing an employee's wages from hourly to salary;
  - you want to give a former employee a negative job reference;
  - you want to prevent a former employee from competing with you or disclosing information to a new employer;
- and
- you have been named as a defendant in a lawsuit or administrative claim.

You should also consider seeking the strategic legal advice of a lawyer in connection with a termination if:

- the worker has an employment contract that limits your right to fire (or believes he does!);
- the employee is due to vest a bonus, benefits, stock options, or other money shortly;
- the employee recently filed a complaint or claim with a government agency or complained to you of illegal or

unethical activity in the workplace;

- the employee recently complained to you about discrimination, harassment, or other unlawful workplace conduct;
- the employee is on a leave or has recently returned from a leave (such as FMLA, PDL, Workers Comp., etc...);
- the employee is in a protected class (e.g., a minority, is pregnant, has a disability, or practices a particular religion);
- you are concerned about the worker's potential for violence, vandalism, or sabotage;
- the worker has access to your company's high-level trade secrets or competitive information and may use them;
- you are firing the worker for excessive absences if you are concerned that the absences may be covered by the Family and Medical Leave Act or the Americans with Disabilities Act;
- the employee denies committing the acts for which you are firing him or her, even after an investigation; or
- the employee has hired a lawyer to represent him or her in dealing with you.

*Part II of "The HR Professional And The Employment Law Attorney: A Match Made In Heaven?" will appear in the December issue of the Employment Law Reporter and will cover hiring and managing the relationship with employment law counsel.*