



PERSONNEL LEGAL ALERT

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Anonymous Whistleblower Wins Retaliation Claim

Like it or not, employees have the right to file anonymous complaints with the appropriate government agency. The employer does not have the right to try to uncover the employee's identity. See how one company's reaction to an anonymous safety complaint resulted in an employee winning a retaliation lawsuit.

EMPLOYEE TRIES TO STAY SAFE

A supervisor complained to his manager and the safety manager for approximately three years about the high levels of smoke, heat, and paint dust in the work environment. He claimed they contaminated the food in the lunchroom. He also asserted that the masks employees used didn't provide adequate protection, as he often found paint residue in his nose when he got home. Eventually, the supervisor filed a complaint with the Occupational Safety and Health Administration (OSHA) and asked to remain anonymous.

— *continued on page 2*

Rescinding A Job Offer Is Ill-Advised, But Not Illegal

She seemed to be the perfect candidate, so you were thrilled when she accepted your job offer. That is, until you began checking her references. Or you lost your biggest customer. Or someone with even more stellar qualifications crossed your desk. Now, you have the difficult task of rescinding the offer. Nothing will make it any less awkward, but there are factors that can increase your risk of legal liability.

Don't worry, you do have the right to rescind job offers. The employment-at-will doctrine is generally not contingent upon an individual actually starting employment. Just as an employer may fire a current employee at any time, for

— *continued on page 3*

Anonymous Whistleblower Wins Retaliation Claim (cont.)

The next day, the angry plant manager showed the supervisor the letter from OSHA and asked him who had sent it. When the supervisor played dumb, the plant manager told him to find out.

Shortly after that, the safety manager gave the supervisor a safety manual. He refused to sign a statement indicating he had read it because the conditions in the plant were not on par with the manual.

Not much more than a month following his complaint, the supervisor was fired. The division president cited poor leadership and supervision in the termination letter. However, two days later, a memo from the division president to the company president stated that cost containment was the reason the supervisor was let go.

The supervisor sued the company for retaliation, claiming he was fired as a result of his OSHA complaint. Despite no clear evidence that the employer

knew he was the whistleblower, a jury awarded the supervisor approximately \$112,000 in damages. (*Gomez v. The Finishing Co.*, IL App. Ct., No. 1-05-3386, 2006)

EMPLOYER HAS NO SAFETY NET

Although the company claimed it didn't know who filed the complaint, the jury wasn't convinced. Here's why.

1. It fired the supervisor shortly after the complaint was filed. The termination occurred within five weeks, and after the employer made an attempt to uncover the identity of the individual who complained.
2. It gave inconsistent reasons for the termination. The executive who fired the supervisor told him one thing, but then told the company president another.
3. It lacked documentation to support its performance-related termination reason. Not only that, but the supervisor had received a raise the year before.

While firing an employee shortly after he/she files a complaint with OSHA is not illegal in and of itself, the company's inconsistencies and lack of evidence convinced the jury of a retaliatory motive. ✧

School's In, Employees Out

Leading educators have concluded that the key to children's education is active parental involvement. Many working parents face a tough dilemma trying to find a few hours off from work for a child's school event. Some states have helped by passing parental leave laws for school-related events. The chart on page 4 provides a brief summary of laws for private employers. States without such laws or with laws specific to public employers only are not listed. Please be sure to check with your state department of labor for full details.

PERSONNEL PAUSE

It should go without saying that when OSHA comes knocking on your door, the last thing you should do is try to determine who made the call and punish him/her. Do not try to find out by directly asking employees or by indirectly asking someone else to find out. And never assume that you know who it is. It may be logical that the employee who has been vocal internally would be vocal externally, but you might have an employee who doesn't want to create waves with management and will go straight to the government instead.

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Rescinding A Job Offer Is Ill-Advised, But Not Illegal (cont.)

any reason, an employer may rescind a job offer to a prospective employee. (Workers have the same right to quit — or withdraw their acceptance of an offer.) But, as Donna Scimia, President of Scimia Consulting Group, Inc. (Pleasantville, NY) warned, “At-will doesn’t give employers carte blanche to rescind offers.”

CAUSES AND EFFECTS

No matter how defensible your company’s reason for rescinding an offer, an applicant may still bring legal action against the organization for the following reasons.

Promissory estoppel. Under this legal theory, a court may force one party to fulfill a promise made to another if certain conditions are met. “If an organization makes an offer, and then the person relies on that offer and, for example, moves, sells their house, etc., basically gives up something of value, the person might be able to file a claim against the company and get recovery,” Scimia said. That the applicant quit their current job generally won’t result in liability.

Fraud. Fraud-related claims (e.g., false representation, negligent misrepresentation) typically require an applicant to show that the company knowingly made a false statement or provided false information, the applicant justifiably relied on it, and the applicant was harmed by the reliance. This may occur where an employer fails to inform an applicant about the impending closing of the branch to which the individual is being hired.

Breach of contract. Applicants may get the impression that an employment contract exists and their at-will status has been altered. (**Note:** Breach of contract claims may be based on either written or oral communications.) Employees may try to claim that the specification of an “annual” salary or even a firm start date created a contract. They aren’t likely to prevail. *More worrisome:* mentions of a specific length of employment and for-cause terminations.

PROTECTING YOUR COMPANY

HR needs to be proactive in thinking about the process of withdrawing a job offer, rather than reactive. “Don’t wing it,” Scimia said. Think about the following.

1. Write offer letters that won’t be mistaken for a contract.
 - Include language regarding employment at-will and the individual’s understanding of the terms of employment. Add a disclaimer stating that the offer is not intended to be a contract and is not a guarantee of employment.

The following language helped one employer dodge an applicant’s breach of contract claim when it withdrew its job offer after contacting the applicant’s references. (*Petitte v. DSL.net, Inc.*, CT Ct. App., No. AC 27557, 2007)

“[T]his letter is not a guarantee of employment for any specified length of time by either party. While it is our hope that you will have a long and fruitful career with [the company], your employment will be ‘at-will,’ which means that either you or the company can terminate your employment at any time for any reason, with or without cause.”

- State that the offer is “dependent upon” or “contingent on” the applicant meeting your company’s requirements (e.g., reference check, drug test, physical exam, signing a non-compete agreement). “Outline the conditions so there are no surprises,” Scimia advised.
- If you do include details such as a start date or salary, say that they are “tentative.” “The letter should not give the impression that it is a done deal,” said Scimia.
- Don’t be too much of a “cheerleader,” she added. “Statements such as ‘we’re happy to have you on board’ should not be in an offer letter.”

2. Consider having the top applicant fulfill requirements before you extend a job offer. The employer in *Petitte* had not asked for any references prior to offering the applicant the job and issuing the letter. It may have been able to avoid the legal battle had it simply told the applicant that it would *like* to offer him the job, but it needed to check his references first. (**Note:** A conditional job offer is required for medical exams, but not tests for illegal drugs.)

3. Think about offering the applicant some reimbursement, to avoid getting a bad reputation. “Rescinding offers, if it gets out, gives off a bad vibe,” Scimia said. Not only that, but compensating the applicant for costs incurred between the time you made the offer and rescinded it may be more cost-effective than fighting off a lawsuit. To help you decide, check with your attorney as to whether the applicant could prevail in court. ✧

PERSONNEL PAUSE

Once the decision to withdraw an offer is made, “move quickly,” advised Scimia. The greater the delay, the greater the impact on the person, the greater the basis to sue.

STATE PARENTAL LEAVE LAWS

State	Coverage	Requirements
California	All employers Employers of 25 or more at same site	Unpaid for suspended child; or accrued leave for sick child Unpaid; grades K-12; 40 hours per child a year (8 hours a month); includes day care; employee provides reasonable notice
District of Columbia	All employers	Unpaid or accrued leave; 24 hours in 12 months for school-related activities; employee provides notice at least 10 calendar days in advance
Illinois	Employers of 50 or more	Unpaid; 8 hours per school year for all children; employee provides written request at least 7 days in advance
Massachusetts	Employers of 50 or more; employee works 12 months and 1,250 hours	Unpaid; 24 hours in 12 months for school activities or medical appointments; employee provides at least 7 days' notice
Minnesota	All employers	Unpaid; 16 hours for school activities for all children; employee provides reasonable notice
Nevada	All employers	Employees can't be fired for attending a school conference or emergency
North Carolina	All employers	Unpaid; 4 hours in 12 months for school activities for all children; employee provides written request 48 hours in advance
Rhode Island	All employers; employee works 12 months	Unpaid; 10 hours in 12 months for children's school activities; employee provides 24 hours' notice
Vermont	Employers of 15 or more; employee works 1 year and 30 hours a week	Unpaid or accrued leave; 4 hours in 30-day period, up to 24 hours in 12 months for school activities, medical appointments, or medical emergencies; employee provides earliest possible notice, or at least 7 days' notice

The Importance Of Year-Round Employee Benefits Communication

Health care costs are an issue for just about every company. One common employer practice could be contributing to the problem. Many companies only communicate their benefits programs to employees once a year, piling on the information at open enrollment. (See **PLA**, June 18, 2007.) It is better to have the communication going all year round, according to Matthew Roberts, Vice President of Employee Benefits for Brown & Brown of New Mexico (Albuquerque). “If employees are only looking at their benefits once a year, the employer is starting at square one every year, especially with employees that [rarely] utilize the benefits,” he warned. “Most are not going to retain much of the information.”

Roberts pointed to a survey released in July by Watson Wyatt Worldwide, which revealed that many employees struggle with basic health benefits terms. “How are we going to fix the problem with health care if employees can’t explain simple terms?” Roberts commented. A top challenge for 43% of the nearly 2,100 surveyed employees is understanding what their health plan covers. Less than half are comfortable explaining common health benefits terms, such as co-pay or deductible, to a friend or co-worker; fewer than one in four feels comfortable describing health savings accounts, co-insurance, and terms such as formulary.

ONCE A YEAR IS NOT ENOUGH

Communicating different parts of your employee benefits program throughout the year will make open enrollment that much easier. “If your open enrollment meeting lasts more than 30 minutes, you’re going to start losing people,” said Roberts. “An employer can spend less time on basic questions and more time discussing the reasons for rising costs, the employer’s position, plan changes, etc. If the deductible is going from \$500 to \$1,000, focus on that. You can also focus on specific provisions of certain plans and dig into them more in depth.”

Employees primarily care about changes occurring to their medical and dental plans since these will be used during the course of the year. At other times throughout the year, you can focus on life or disability insurance or the retirement plan.

“Employers should [also] make sure employees are using some of the benefits that don’t necessarily add cost to the bottom line, such as routine physicals — the whole ‘ounce of prevention is better than a pound of cure’ idea. Say an employer finds out that only 50% of its members on the health plan are getting routine

physicals done. This would be one provision I would target because it’s important and it’s measurable, at least for larger groups,” said Roberts. He suggested measuring progress with quizzes (“sounds childish, but it works”), surveys, and reports from medical or dental carriers. “What works best is going to depend on company culture.”

Roberts’s big focus is on changing lifestyle behaviors. “It’s not rocket science as to why our health care is out of control, so until we deal with the root of the problem — obesity — nothing is going to change. Health renewals aren’t going back to 3% or 4%, and managed care has pretty much run its course. So either we can focus on preventing illness or disease, or we can complain about rising health care costs.”

HEALTHY COMMUNICATION

If an employer is targeting a specific goal, the only way to achieve it is by continuing to reach out to its employee base. “Don’t be afraid to use different mediums of communication,” Roberts advised. He believes having frequent face-to-face meetings would be best, but admits it’s not always feasible, so also try the intranet, e-mail, handouts, payroll stuffers, and posters. What works best “is really going to depend on the industry. White collar or blue? Does everyone have access to the intranet? What’s the average education level? What’s the average age of your employees? Different mediums work better for different age segments. So, as you can see, there’s a pretty good amount of planning that goes into this.”

Any successful communication campaign will need to be backed by senior management. Otherwise, “it will fail, since they aren’t going to allocate the proper funds and time for it. I suggest having the CEO/CFO sit in on occasional meetings to get a better understanding of what’s going on. I know they’re busy, but [attracting and retaining employees] and health care costs are on the top of everyone’s lists of concerns.” ✦

PERSONNEL PAUSE

Keeping employees involved in their benefits is a perfect way for employers to maximize the return on their investment, as well. “Employees who understand their benefits and the costs associated with them, tend to have a better appreciation for what their employer is providing them, and this should lead to higher levels of retention,” said Roberts.

HUMOR RESOURCES

Applications, Cover Letters, And Résumés, Oh My!

Got multiple résumés from the same individual with completely different work history.

My all-time favorite cover letter began “Dear Sir or Madman,” and went downhill from there.

I got one that indicated the reason for leaving a previous job was a failed murder attempt.

An application for an electrician position was about six pages because the guy attached badly xeroxed photos of himself welding things.

When a former employee, who we were actually glad to see go, applied for another position a couple of years later, they actually lied on their résumé and application about what job they’d had when they originally worked for us!

Under “Work Performed” the applicant wanted to say that she provided assistance to customers

but ran out of room, so she abbreviated the word “assistance” by cutting it off after the first three letters. So on the résumé it said that, in that particular job, she “helped anyone needing ___.”

A guy claimed he had a doctorate on page one and an associate’s degree on page three.

A cover letter for a position requiring proofreading skills stated that the applicant was relocating back to “Jew Jersey.”

I was listed as a reference for a woman who had never worked for my company during the specific years or in the particular position she stated (or at any other time or capacity). Unfortunately for her, the company had less than 25 people and she had a very unique name, so there was no way I could have missed or forgotten her, which is what I told the reference-checker.

Immigration

Undocumented Workers Have Employment Rights, Too

Your company is in the midst of fighting an employment lawsuit when you discover that the employee supplied you with fraudulent immigration papers when he was hired and is in the country illegally. You breathe a sigh of relief; surely, this fact will get the case tossed. Don’t be so sure.

Generally speaking, the protections of most labor laws extend to undocumented workers. While this might appear to fly in the face of federal immigration law, it actually protects the spirit and intent of the law. How? Just think how attractive undocumented workers would be to unscrupulous employers if illegal aliens had no employment rights.

UNDOCUMENTED WORKERS’ RIGHTS

In 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds, Inc. v. NLRB* (No. 001595) that undocumented workers were prohibited from receiv-

ing back pay for an employer’s National Labor Relations Act (NLRA) violation. Some employers have interpreted this ruling to mean that undocumented workers aren’t entitled to the protections of federal labor laws. Nothing could be further from the truth.

To drive home the point that the *Hoffman* ruling did not render undocumented workers ineligible for protections under the NLRA, the National Labor Relations Board (NLRB) issued a clarifying memo that stated undocumented workers are still employees under the NLRA, and, thus, are protected from unfair labor practices and have the right to engage in collective bargaining and to union organizing.

The Equal Employment Opportunity Commission, Department of Labor, and several federal and state courts have also taken the position that, while immigration status might be relevant in determining back pay, it has no bearing on liability. Consequently,

Undocumented Workers... (cont.)

illegal immigrants are protected by: the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, the Fair Labor Standards Act, the Occupational and Safety Health Act, the Mine Safety and Health Act, and state Workers' Compensation laws (though protections vary by state).

EMPLOYERS' OBLIGATIONS

Drill home to your managers that employees' immigration status does not factor into their obligation to provide *all* workers with:

1. a work environment free from discrimination and harassment;
2. at least minimum wage for all work performed;
3. a safe work environment; and
4. the freedom to pursue legal claims as provided by law.

Since immigration status is irrelevant to determining whether an employer violated an employee's rights, employers may not make any attempts to discover employees' status in response to a lawsuit. In fact, such attempts to take the focus off the company's alleged wrongdoing and put it onto workers' status may be seen as violations themselves. To allow otherwise would have a chilling effect on the exercise of employment rights.

The prohibition against delving into employees' immigration status includes inquiring into workers' Social Security numbers (SSN). *Said a New York district court*: Allowing employers to ask about SSNs contained in employment applications and W-4 forms would produce exactly the intimidating effect on claimants that the protective order's bar against questioning them about immigration status was intended to avoid. (EEOC v. First Wireless Group, Inc., E.D.NY, No. 03-CV-4990, 2007)

Also be careful of trying to correct deficiencies in I-9 forms. One employer tried to argue that it hadn't realized there were deficiencies in its personnel files until a group of Hispanic workers filed a harassment and hostile environment lawsuit, and that it was just trying to right its record-keeping wrongs by asking the workers to complete the documentation.

A court dismissed that rationale as "not plausible," since the company hadn't completed employment eligibility documentation for any employees since its inception in 1989. It found that "the main purpose behind this alleged newfound desire to abide by the law is to effect a not so subtle intimidation" of the employees. (EEOC v. Glenview Car Wash, N.D.IL, No. 05 C 5568, 2006)

To show a legitimate attempt to correct deficient I-9 forms, it would help to follow a consistent process of checking all new hires' documents and auditing I-9s. ↩

We Couldn't Make This Up If We Tried...

This will make employees think twice about asking for a raise. The owner of a car dealership in Georgia confessed to shooting to death two employees who kept asking for more money. The owner claimed he was under a lot of stress due to financial problems and just snapped.

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EDITORIAL

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There Is Such A Thing As An Accidental Termination

Just as there is more than one way to skin a cat, there is more than one way to say, “You’re fired.” As a matter of fact, the words “fired,” “discharged,” or “terminated” need not ever be uttered to give an employee the impression that his/her services are no longer needed.

Case in point: When an employee complained to the office manager about her workload, the office manager told her that she had been meaning to talk to her about her performance. In short, she was not performing up to expectations. The office manager also said that it was in the employee’s best interest to look at other options and to start looking for another job. When the employee left the office manager’s office, she left for good.

The employee sought unemployment benefits, but was denied because it was determined that she had voluntarily quit. In the end, a court held that the employee was entitled to collect. *Reason:* Although the office manager did not use the words “fired” or “terminated,” telling her to look at other options and look for another job carried an “immediacy and finality” of a firing. (Cipriani & Werner, P.C. v. Unemployment Compensation Board Of Review, PA Commonwealth Ct., No. 2025 C.D. 2006, 2007)

ACTIONS BELIE INTENTIONS


The office manager contended that it was not her intention to fire the employee that day, but the employee had walked out of the meeting before she could finish. Her intention, she testified, was to inform the employee that: 1) if she chose to look for work outside the company, she could stay on until she found a new job, and 2) if she wanted to remain with the company, she could apply for any open position. However, she lacked credibility in court because she never provided those two pieces of information to the employee.

Managers must be made aware of how their actions may belie their intentions. In a situation where one must communicate with an employee about performance issues, ensure that the employee does not conclude he/she is being fired (if that is not the intention).

- Plan the meeting by creating an agenda that covers: the employee’s performance issues; a plan for improvement, including goals, deadlines, and training; the list of open positions for which the employee can apply; etc. This will help ensure the meeting stays on track.
- State the goal of the meeting at the outset. Without knowing whether the purpose of the meeting is about an improvement plan or a termination decision, an employee may assume the worst.
- Choose words carefully. Precede a suggestion to look into other jobs by emphasizing: “While you are not being terminated at this time...”
- Finish the meeting. Even if the employee wants to end the meeting, the manager calls the shots. If the employee is too upset to continue, the manager should get the employee to agree to a new time to meet. ✧

PLA Post Office

Reader: I went to a seminar in which the speaker said that females wearing revealing clothes have been considered by courts as sexual harassment of the males. Can you explain?

 **PLA responds:** To be honest, no. Without further details, it is hard to imagine a male employee filing a sexual harassment lawsuit based on a female employee’s revealing clothing, let alone a successful one. And that’s not making the stereotype that all men enjoy looking at scantily clad women.

Theoretically, a male employee *might* have a successful harassment claim if the following factors existed.

1. The woman wore such revealing clothing to the point of being obscene. *However*, clothing that is merely revealing (in the traditional sense of the word) would not rise to the level of severe or pervasive that would be necessary to file a valid harassment claim. (If the clothing were revealing enough to rise to that level, the individual would probably be arrested on indecency charges before she made it to work!) Courts consider whether a *reasonable* person would be offended.

2. The male employee found it to be offensive enough to alter his working conditions. *However*, if the employee merely finds the clothing to be distasteful or it makes him feel uncomfortable, again, the severe/pervasive standard has likely not been met.

3. The male employee could show that he was harassed because of his gender. *However*, if female employees are also offended, the male employee will have a difficult time proving harassment based on sex.