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## Five tips help employers avoid lawsuits

After 18 years of counseling clients on employment-related issues, I have come to understand that the prevention of the most problematic employment litigation can be boiled down to five simple tips. Knowledge of these five tips can help keep your employees happy and help you avoid needless litigation.

**1. If it is not job-related, do not ask.** Those who interview prospective employees should be counseled not to ask questions that could lead to a claim that the applicant was not hired based on protected characteristics such as gender, race, religion or national origin. Questions pertaining to a person's age, marital status, children and politics should not be a part of the interview process. Make every attempt to avoid indirectly seeking protected information with questions regarding dates of graduation and even the celebration of holidays — i.e., Christmas. If an interviewee brings up those topics, try to steer the conversation back to the job requirements and the applicant's qualifications. Equally problematic are questions that probe or could elicit an applicant's confidential business dealings with their current employer. Stick to the issues of the job and the applicant's ability to do that job.

**2. Be aware that everything you say can and will be used against you.** You and your clients should be aware that every statement made in the work setting in the presence of other employees, even informally, could become part of an employment action. Make sure your employees are educated on your company's or firm's nondiscrimination and harassment policies

and complaint procedures, including the identity of multiple individuals to whom a complaint may be made. Employee reviews should be honest and complete. Any issues with an employee's performance should be documented and the employee should be provided opportunities and suggestions for improvement, if possible. A positive review of a problematic employee can undermine firm or company performance as well as complicate termination of that employee.

**3. Make sure there is a procedure for investigating complaints and implementing corrective action.** Your company or firm should have a procedure in place that allows the complainant to provide your company or firm with all of the facts, including what occurred, when, where and who was involved. The procedure should allow for the identification and review of any relevant documents and the interviews of relevant witnesses. If those witnesses

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agree, they should have the opportunity to sign witness statements. When recommending any corrective action, make sure that you have asked the complainant what they believe to be an appropriate remedy. Other factors to be considered in an investigation include whether or not any company or firm policies were potentially violated by the alleged misconduct, the severity of the alleged misconduct and the accused's overall record. Be consistent in handling employees, or be prepared to defend your exceptions. Consistency will enable you to defend against any claim of discrimination.

**4. Be up-to-date on wage-and-hour laws.** Your firm and clients must know the latest law interpreting the provisions of the Fair Labor Standards Act, applicable state wage-and-hour laws and the prevailing minimum wage laws. Timekeeping and payroll practices and

exempt/nonexempt classifications should be audited (with the knowledge that these audits could be discoverable in any subsequent litigation). Job descriptions also should be reviewed to ensure that they are written to support any decisions on classifications. Any unpaid internships or independent contractor arrangements should be approached with caution and carefully reviewed for compliance with the law. Supervisors should be trained on your firm's or client's wage-and-hour policies and have a reporting procedure in place for any wage and hour complaints.

**5. Get a release.** When terminating employees, if at all possible, have those employees sign a release. The release should be supported by adequate consideration. If the release is for an employee over the age of 40, it should comply with the requirements of the Older Workers Benefit Protection Act. Make sure that the wording of the release is clear and specific and that the employee is afforded the opportunity to review the release before signing. If the employee has left abruptly without notice, and/or has refused to sign the release, take the time to check for discrepancies in documents or records and try to ascertain that employee's future plans.

Following these five tips will go a long way in preventing problematic employment litigation for your company or firm. When in doubt on any of these issues, do not hesitate to contact an employment lawyer. As I have found in my practice time and time again, preventing a claim before it happens is much cheaper and easier than dealing with an administrative proceeding or lawsuit.