THE TOP TEN DON'TS FOR EMPLOYERS WHO WANT TO AVOID LITIGATION: A PRACTICAL, COMMON-SENSE GUIDE TO STAYING OUT OF COURT

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I believe in "preventive law"—much like "preventive medicine"—because doing one's best to prevent problems is much less painful (and less expensive) than trying to solve them once they've occurred. Having been an employment attorney for over 20 years, and having represented both employers and employees in litigation, I've distilled some of the more common things for people to avoid if they wish to stay out of lawsuits. The workplace relationship is like any other relationship; it takes *work* to make it work.

DON'TS

1. **DON'T LIE.** Don't even *stretch* the truth. (This applies to both employees and employers.) As an employee, you should consider whether stretching the truth on your résumé or job history is *really* worth getting fired for it later. Employers should consider whether sugar-coating the reality of the job is worth the very real possibility that those "white lies" or "slight exaggerations" will come back to bite you in the form of an expensive, ugly and time-consuming lawsuit.

Be wary of common law promissory estoppel claims. Even if no actual contract is formed, the other party may still have a claim based on promises made. In order to prevail under a theory of promissory estoppel, a plaintiff must present sufficient evidence that (1) promises or inducements were made; (2) he reasonably believed or relied upon the promises; and (3) he will be harmed if estoppel is not applied. Heidbreder v. Carton, 645 N.W.2d 355, 371 (Minn. 2002).

Be wary of statutory promissory estoppel claims. In Minnesota, under Minn. Stat. § 181.64, it is unlawful for any person or company "to induce, influence, persuade, or engage any person to change . . . from any place in any state . . . to work in any branch of labor through or by means of knowingly false representations . . . concerning the kind or character of such work, the compensation therefor . . ." Minn. Stat. § 181.64. An individual who was induced, influenced, or persuaded "to enter or change employment . . . through or by means of any of the things prohibited in section 181.64" is entitled to recover damages sustained as a result of the false representations. Minn. Stat. § 181.65.

Also be wary of misrepresentation and fraud claims. To establish a claim of fraud, the defrauded party must establish that the defrauding party: (1) made a representation (2) that was false (3) having to do with a past or present fact (4) that is material (5) and susceptible of knowledge (6) that the representer must know it to be false or must assert it as of his own knowledge without knowing whether it is true or false (7) with the intent to induce the other person to act (8) and the person in fact is induced to act (9) in reliance on the representation (10) and the defrauded party must suffer damages (11) attributable to the misrepresentation. Davis v. Re-Trac Mfg. Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967); see also Gorham v. Benson Optical, 539 N.W.2d 798, 802 (Minn. Ct. App. 1995). Deception is an essential element of fraud. Davis, 276 Minn. at 118, 149 N.W.2d at 39.

2. **DON'T ASSUME.** Making certain basic assumptions about behavior—especially assumptions based on "common sense" and perceived societal norms—may seem safe, but doing so can get employers into trouble. Every employee's background is different and it is safest to clearly explain expectations about job performance and behavior at work *before* an employee

starts working. If employers have specific expectations, put them in writing, in a job description, in a policy or in a guide for workplace behavior.

Camden-Clark Memorial Hospital assumed that its pregnant patients would not want a male obstetrics nurse for privacy reasons so it refused to consider a male nurse applicant. The applicant sued and the Supreme Court of West Virginia held that the hospital was required to show that being female was a requirement to perform the essential duties of the nursing job. Slivka v. Camden-Clark Memorial Hospital, 594 S.E.2d 616 (W. Va. 2004).

3. **DON'T SIT QUIETLY.** *MANAGERS NEED TO ACTUALLY MANAGE AND EMPLOYEES NEED TO TAKE INITIATIVE IN THE RELATIONSHIP*. Most lawsuits result from hurt feelings and a lack of clear communication between the employee and the employer. Employees sue when they feel disrespected by their employer. Employers fire people who they believe are not doing what they should be doing to help the organization. Employers should document expected performance and the failure to meet any performance expectations, including a failure to meet expected levels of appropriate conduct. Employees also need to take ownership of the employment relationship. As an employee, check in with your manager to see how you are doing and send an email documenting what you took away from that conversation. If an issue arises later, you've already communicated your understanding of the situation. And, if the manager did not correct your understanding, it may be unfair for him or her to be upset with you about any actions you took based on that understanding.

Consider that even if an employer notifies supervisors that racial incidents will not be tolerated and will subject them to disciplinary action, institutes a sensitivity training program, and has an attorney lecture employees on affirmative action, if the employer does not address an employee's specific complaint of racial discrimination, then the employer's actions are insufficient to avoid a claim of harassment. Ways v. City of Lincoln, 871 F.2d 750 (8th Cir. 1989).

4. **DON'T BE CARELESS ABOUT EMAIL OR THE WEB.** Suffice it to say that email can often be misunderstood. If you want to create or maintain a workplace where everyone feels respected, you have to consider whether what you are writing in an email about would be better handled in person. Taking it one step further, employers should consider communicating to all employees that live conversations about important subjects (like job performance and duties) are always preferred over email as an expectation or policy. Employer monitoring of email is a dicey subject. Recent court decisions suggest that employers may only monitor email if they tell their employees in advance, and in writing, that they actually *do monitor* email (not just *reserve the right to* monitor).

Consider the recent U.S. attorney firing scandal facing Attorney General Alberto Gonzales. He probably wishes he had communicated to all Justice Department employees via live conversations, rather than through email. Typically, live correspondence about job performance and termination are better than email correspondence, even though confirmatory email is perfectly appropriate.

5. **DON'T PROCRASTINATE OR IGNORE PROBLEMS.** In this area, the advice is the same for employers and employees: If you have an issue at work, raise it directly, deal with the

concern in a straightforward way, decide what you are going to do to address it, then move on. Don't raise your voice; be direct; state your concern quickly and clearly; and be done with it. The good news for employers is that employment laws motivate employers to address workplace and performance problems, and the employment laws are quite forgiving. In most instances, the law lets employers off the hook—at least to some extent—if they do the right thing to fix problems once they know about them.

Employers should consider that they risk liability when a supervisor who received verbal complaints of harassment fails to take corrective action because knowledge of coworker harassment will be imputed to the employer upon notice to the supervisor. Bailey v. Runyon, 167 F.3d 466 (8th Cir. 1999). Employers need to begin to address the problem the same day the supervisor becomes aware of the harassment.

On the other hand, when an employer acts promptly, it can avoid liability for a supervisor's acts. The Minnesota Court of Appeals held that an employer was not liable for sexual harassment committed by a supervisor when it forced that supervisor to resign within five days of imputed notice of the harassment and within the next working day after receiving actual notice of the harassment. The employer was not liable because it took prompt remedial action to end the harassment. Fore v. Health Dimensions, Inc., 509 N.W.2d 557 (Minn. Ct. App. 1993).

Employees should consider that by refusing offers from the employer to remediate a harassment situation, the employee may lose the ability to make a constructive discharge claim if she later resigns from her job. A court may consider it unreasonable that the employee refused to accept assistance from the employer, thus giving the employer an affirmative defense to a constructive discharge claim. Hardage v. CBS Broadcasting, Inc., 427 F.3d 1177 (9th Cir. 2005).

6. **DON'T FORGET THE PERSONNEL FILE.** In Minnesota, employees have a right to review their personnel file at regular intervals. If an employee objects to something that is contained in the personnel file, s/he has the right to set the record straight through an agreement with the employer or a rebuttal to the document, which the employer must include in the personnel file. What should be included in a personnel file is clearly defined in the Minnesota statutes. Copies of all disciplinary notices are supposed to be maintained in an employee's personnel file. The file may also be used as a way to document and communicate that the employee was treated fairly, thereby dissuading employment lawyers from pursuing litigation against the employer.

The attached document, "What Is And Is Not In A Personnel File," provides details regarding the personnel file requirements under Minnesota statutes.

7. **DON'T GIVE AWAY TOO MUCH POWER.** Both sides in the employment relationship have rights. Employers have the right to call the shots. Someone has to have the final word on decisions that impact the business and those decisions belong to management. It is the employer's business and the employer can run it however it wishes, within the boundaries of the law. Employers should also be careful about how much authority is given to employees. On the other side, employees have the right to be free from discrimination, harassment or other illegal treatment. Employees should expect nothing less than to be afforded their full rights under the

law (*e.g.*, overtime). And employees need not forgive an employer's "innocent" failure to follow the law. Neither a lack of intent to violate nor being ignorant about the law will excuse an employer from liability for a violation.

Consider FLSA's minimum wage and overtime provisions. 29 U.S.C. § 206 states that "every employer shall pay. . ." a minimum wage, and 29 U.S.C. § 207 states that "no employer shall employ. . . " a worker over forty hours. Neither have a requirement for malicious intent by the employer for a violation to occur. Further, the FLSA penalties provision, 29 U.S.C. § 216, does not require the employer to have a particular state of mind in violating §206 or § 207 for the penalties to apply to the employer. While § 216 provides additional penalties for a willful violation of FLSA, *any* violation is subject to some penalties under the Act.

8. **DON'T GET CUTE WITH THE GOVERNMENT.** I often see employers and employees mutually agreeing to creative compensation or working arrangements. With respect to compensation, if employees and employers do not comply with the laws governing the payment of wages, they could be in trouble with the state government, the IRS, the Department of Labor or some other government agency. Trust me: litigation with the government is even less fun than battles between employees and employers. When an employee is entitled to overtime, employers should pay it. Mischaracterizing employees as independent contractors can result not only in litigation by the worker over lost benefits, but it can also result in fines by the Department of Economic Security and the IRS, to name a few; some of these fines apply to both employers and employees.

The Federal Express cases we have all read about provide a good example of how being cute can create problems later. The company has been faced with significant litigation involving its drivers based on Federal Express's characterization of the drivers as independent contractors. Each driver's contract lists him or her as an independent contractor, but a review of the drivers' job description and control over the job suggests that the drivers are employees. Many lawsuits have been filed by drivers seeking benefits they would have received as employees and the NLRB has taken notice of the situation. The cases have now been consolidated into a multi-state class action. To obtain case names and numbers for all of the cases involved in the class action go to the plaintiffs' official website at http://www.fedexdriverslawsuit.com/casesum.htm.

9. **IF YOU ARE GOING TO TERMINATE SOMEONE, ABSENT SOME CLEAR INCIDENT OF MISCONDUCT, BE SURE TO GIVE HIM OR HER WRITTEN NOTICE OF THE PROBLEM(S).** Employees who leave an employer are less likely to sue if they feel as though they were told what they were doing wrong and given an opportunity to improve. Also, jurors have an innate sense of fair play that often overrides the specifics of the law in cases. Jurors deciding employment law cases will be looking for signs of fair play. Employers should document everything about how they have treated an employee fairly and clearly communicated about expectations. Such documentation will also be helpful in unemployment compensation matters.

For example, a nursing home cook stated on her application for employment that she was not under a doctor's care despite the fact that she was under doctor's supervision for Hepatitis C. When she cut her hand in the kitchen, the nursing home learned that the cook had the disease. The nursing home refused to let the cook return to work even with a doctor's note stating that it was safe for the cook to work in the kitchen. After the fact, the nursing home claimed that it

terminated the cook for providing false information on her employment application. While this may be a legitimate reason for termination, a jury found that the actual reason for termination was that the nursing home regarded the cook as disabled and discriminated against her for having Hepatitis C. EEOC v. Heartway Corp., 466 F.3d 1156 (10th Cir. 2006). Had the nursing home documented the situation differently, the outcome could have been different.

10. **MANAGING EMPLOYEE ABSENCE IS CRUCIAL.** Employees have many legitimate reasons for being away from work and there are many laws that protect employees' rights to time off; therefore, employers need to be educated about the law in that area. As an employer, you must know your obligations under the state leave laws, the Family Medical Leave Act, the Americans with Disabilities Act, the state human rights law, and the state workers' compensation law. My advice? Hire an expert to help you sort through it all and come up with an effective absence management program that does not bump into employees' rights.

The attached document, "ADA/MHRA and FMLA Survival Guide," provides information and tips regarding employer and employee rights under ADA and FMLA leave.