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## EMPLOYMENT LAW

Although law firms are a unique type of workplace in many respects, they nevertheless remain a workplace that is subject to federal and state labor and employment laws. In this BNA Insights article, Brody and Associates attorneys Robert Brody and Allison Smith look at employment-related legal issues that can arise at law firms and offer guidance for attorney employers looking to avoid litigation.

### Lawyers as Employers—Firms Aren't Exempt From Employment Law Issues

BY ROBERT G. BRODY AND ALLISON E. SMITH

**T**here's an old saying that the cobbler's children have no shoes. This proverb is often true of lawyers. Just think about how many contracts we all sign without reading them!

When it comes to complying with employment laws, lawyers can be some of the worst offenders. Typically this is not willful, but simply because we are often too busy being lawyers rather than managers. This is a mistake. Employees—including associates—are increasingly willing to litigate, and with increased enforcement by federal and state agencies, missteps can be costly. You may remember the Baker & McKenzie administrative secretary of four months who sued for sexual harassment and was awarded \$7.1 million in punitive damages.

If your firm were investigated today, how would you fare? This article covers several topics which you can use to do a self-audit of your firm and some practical suggestions to enhance compliance.

#### Exemptions From Overtime

We begin with an overview of federal and state overtime requirements, including relevant exemptions, plus

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an analysis of one hard-to-classify employee: the paralegal.

As you probably know, the Fair Labor Standards Act (FLSA) requires most employees (called "non-exempt") receive minimum wage plus overtime at time-and-one-half for all hours worked each week over 40. Also, employers must maintain records of all hours worked by non-exempt employees. "Exempt" employees are exempt from those requirements. In a law firm, where 9-5 hours are not the norm, it is important to know who is exempt and who is not, especially with rising wage and hour investigations and class/collective actions.

While several exemptions exist under the FLSA, the ones most relevant to law firms are the "executive," "administrative," and "learned professional." As lawyers, we know words have different meaning in the law than in everyday life. So you should not be surprised that under the FLSA, your firm's "administrative professionals" (i.e., secretaries) are likely neither "administrative" nor "professional" employees. Qualifying as exempt requires passing two tests: the salary test and the primary duties test.

The salary test is usually straightforward: under federal law, exempt employees must receive a minimum salary of \$455 per week. State law may set a higher threshold. As a salary, it must be paid regardless of the number of hours worked and may be subject to only a few statutorily permitted deductions (e.g., full-day absences for reasons other than sickness or accident).

The primary duties test requires careful analysis and is where many employers make mistakes. To qualify as exempt, employees' duties must match those in the statutory definition of "executive," "administrative," or "learned professional."

In general terms (there are extensive regulations), executive employees primarily manage the business, and regularly direct the work of two or more employees. Administrative employees perform office work directly related to management policies or general business operations of their employer and regularly exercise discretion and independent judgment. But beware: if you micromanage your administrative staff, do they really have discretion and use independent judgment? Learned professionals primarily perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. Lawyers performing lawyer work are a classic example of learned professionals.

**But What About Paralegals?** Consider a paralegal with a two-year legal studies degree and eight years of experience in legal research and analysis. Ninety percent of the paralegal's time is spent analyzing facts, identifying the legal issues involved, and then providing an interpretation of the law in memorandum format for attorneys to review. Although attorneys suggest deadlines, the paralegal works very independently.

Ten percent of the paralegal's time is spent reviewing new materials, analyzing costs of current resources used in the department, drafting plans for cost savings for the department, training various personnel on the use of legal resources and legal research in general, and performing other miscellaneous tasks. Exempt? According to a 2006 opinion letter by the U.S. Department of Labor, the answer is no.

The Labor Department first evaluated whether the administrative exemption applied and found the work was not "directly related to the management policies or general business operations" of the firm. Examples of qualifying work include tax, accounting, auditing, and human resources activities. Thus, administrative work is different from the "production" work of the business. Since what the paralegal did was part of the firm's "product," it did not qualify as administrative.

Also, there was no discretion in "matters of significance" such as the formulation, interpretation, or implementation of management policies or operating practices. The Labor Department stated,

"It has long been the position of the [department] that the duties of paralegal employees and legal assistants generally do not involve the exercise of discretion and independent judgment of the type required by the administrative exemption."

**Are Paralegals 'Professionals?'** Citing a specific regulation on paralegals, the Labor Department found the learned professional exemption generally does not apply because although many paralegals have four-year degrees, "an advanced specialized academic degree is not a standard prerequisite for entry into the field."

One bit of good news is paralegals with "advanced specialized degrees in other professional fields [e.g., law, science, or medicine] and [who] apply advanced knowledge in that field in the performance of their duties" may qualify as learned professionals. The regulation provides as an example an engineer/paralegal providing "expert advice on product liability cases or to assist on patent matters."

**Paralegal Supervisors.** Incidentally, although this did not come up in the opinion letter, paralegals might meet the executive exemption if they are supervisors (supervising at least two employees) and spend the majority of their time doing this.

If you just realized your 60-hours-a-week paralegal is non-exempt, you're probably wondering what to do. Employers in similar situations have used several approaches, but suffice it to say, this must be handled delicately.

In close cases, minor changes in duties may satisfy an exemption. However it is likely the paralegal will need to be reclassified. In that case, how you communicate the change can help minimize the likelihood of litigation.

Also remember not to create a "smoking gun" by documenting possible violations. Consider working with employment counsel to develop the best strategy for your specific circumstances.

**Office Manager.** Office managers are hard to classify as they come in many varieties. Some may essentially be secretaries who keep the office tidy and files in order. Others may have significant responsibilities such as handling some aspects of HR, business development, and/or accounting.

Still others may run all aspects of the business other than the provision of legal services. Since exempt status is determined by employees' primary duties, it is no surprise some office managers are exempt while others are not.

Consider an office manager with a bachelor's degree and extensive knowledge of accounting, financial and other non-legal administrative services. He exercises discretion and independent judgment in coordinating meetings and interviews with clients, agencies, medical providers, investment advisors, insurance companies and institutional representatives and preparing corporate reports and minutes. Most of his time is spent on activities related to direct client services or to direct support of executives in the firm. Lastly, he develops his own procedures, assesses alternatives and provides a recommended course of action. Exempt? In a 2003 opinion letter examining these facts, the U.S. Department of Labor again said no.

The issue was whether the administrative exemption was met. As a reminder, administrative employees perform office work directly related to management policies or general business operations of their employer and regularly exercise discretion and independent judgment with respect to matters of significance. On these facts, the Labor Department concluded the employee did

"not appear to have the authority or power to make independent choices free from immediate direction or supervision with respect to matters of significance. Nor [did] he appear to be formulating policy or exercising the type of authority within a wide range that could commit [the] firm in substantial respects financially or otherwise."

Rather, he was only "carrying out the day-to-day functions of [the] firm rather than its management policies . . ." The lesson is that the more authority and autonomy an office manager has in terms of running the firm's business (and not providing the firm's services), the more likely he or she will satisfy the administrative exemption.

While the administrative exemption is generally the most relevant, an office manager regularly supervising at least two employees and who has authority to hire and fire may qualify as a supervisor/executive.

**Document Review Attorneys.** Lawyers typically meet the duties test for the learned professional exemption. To be exempt, employees generally must receive a salary. What about document review attorneys who are often paid hourly? Fortunately, there is a regulation which states employees are exempt from the salary rules if they have a license to practice law and are “actually engaged in the practice thereof.”

What constitutes the practice of law can be a thorny question, and whether these attorneys are doing so has not been litigated in this context. However, if the document review work is only being performed by attorneys (e.g., not paralegals), it should generally be tough to argue they are not actually practicing law.

**A Note on Titles.** With regard to the exempt classification, the law is clear: titles mean nothing. However, when dealing with a Labor Department investigator, you do not want an inconsistent title to confuse him or her. For example, the office manager in the above opinion letter was called an “Administrative Assistant.” While it may not have carried the day, it would not have hurt to call him “Office Manager” or “Director of Administration.” If you have exempt employees, give them exempt-sounding titles.

**Meal Breaks.** Many states require employers to grant a 30-minute meal break (which can be unpaid in most cases) to employees working 6-7 hours or more. While many lawyers routinely work through lunch, this is typically not an issue as long as it is voluntary. However, some states, such as New York, technically require all employees be forced to take a lunch break.

Be careful when letting non-exempt staff work through lunch as employers are required to accurately record their hours and pay them for all time worked. For a person normally working 8-hour days, working lunches can result in 2.5 hours of overtime per week, not to mention violation of the state-mandated lunch break law.

## Avoiding Discrimination and Harassment

Most lawyers, and probably most Americans, are familiar with the basic concepts prohibiting workplace discrimination and harassment. But many employers are unfamiliar with the scope of their obligations and fail to take adequate preventative steps to reduce the risk of liability. As a recent \$95 million sexual harassment verdict demonstrates (111 DLR A-1, 6/9/11), the stakes can be high.

**Legal Basics.** We have all heard discrimination is illegal, but what is “discrimination” under the law? Employees can successfully claim discrimination in two basic instances: 1) where they suffered an adverse employment action, or 2) where they were subjected to a hostile work environment, so long as the discrimination is based on an employee’s membership in a protected class.

Consider the New York partner who constantly berates Red Sox fans. While she is not making many friends in the Massachusetts office, this is not illegal

discrimination since Red Sox fans are not a protected class. However, the list of protected classes in certain states can be extensive and can include: age, ancestry, citizenship, color, disability, marital status, national origin, race, religion, sex, sexual orientation, learning disability or physical disability, family violence victims, and prior criminal record, just to name a few. Even an employee’s family medical history as well as the employee’s genetic make-up is protected under the Genetic Information Nondiscrimination Act (“GINA”) and the new regulations recently implemented (215 DLR AA-1, 11/8/10).

## Strategies for Avoiding Common Pitfalls

**Mandatory Training.** A few states require certain employers provide sexual harassment prevention training to all supervisors. If this rule applies to you, why limit training to only sexual harassment? Since you can get sued for harassment based on any protected class, your training should cover all protected classes. Training is a smart idea even if it is not mandatory.

**Recruiting and Hiring.** We all want to know as much as we can about a candidate before making a hiring decision. However, since employers are prohibited from relying on information regarding protected classes, it is important to avoid such information. For example, avoid interview questions that elicit information about membership in any protected classes. And if you do come upon such information, do not create the smoking gun that documents you uncovered this information. This risk of obtaining protected information is especially relevant given the world of social media. The hiring manager may check Facebook for insight into the candidate’s personality, but if protected classifications, e.g., an applicant’s charitable endeavors and religious associations, are discovered, disregard them. Once the cat is out of the bag, it is hard to argue you did not rely on it if the applicant is not hired.

**Uniform Enforcement of Policies.** You can have the best employment policies in the world, but they will not help unless you are consistent. When you make an exception, although you may have the best intentions, you may be accused of illegal discrimination. For example, you might have spared Attorney A a written warning because “he is one of our top performers,” but when Attorney B gets a written warning for the same conduct, she may claim the disparate treatment was because Attorney A is a young heterosexual white male, and Attorney B is a 50-year-old homosexual Hispanic female.

**Harassment From Clients.** We all know the customer is always right. But when a client harasses your employees, you must respond or face liability. A few guidelines are in order. Make sure employees know the firm does not tolerate harassment even by clients and if employees feel harassed, they should report it immediately. Next, as with all workplace harassment, you must fully investigate it and take appropriate action. Finally, what about the client? A first step may be to contact the owner and explain your mutual problem. But if the harasser is the owner, or the owner just does not care, maybe it is time to fire your client and look for business elsewhere.

## Consider Creating an Employee Handbook

**The Value of a Handbook.** Employee handbooks can simultaneously serve many valuable purposes. A well-written handbook can: express the firm's expectations of employees, manage employee expectations of the firm, and streamline the firm's administration of its personnel policies (and improve consistency); all of which will reduce the risk of employee discontent and litigation against the firm. At the same time, if written properly, it maintains the firm's right to change policies and keep the flexibility you want as an employer.

Drafting an employee handbook with a friendly, positive tone can help foster good employee relations. It should tell employees what you expect of them, which will help avoid performance problems in the future and manage employees' expectations.

**Computers and Privacy (or Lack Thereof).** Electronic data is the lifeblood of today's law firm. You cannot afford to have your computers and internet access compromised. A thorough computer use policy can help protect these assets. For example, the policy should prohibit unauthorized installation of new software. Additionally, the policy should preserve your right to see everything accessed or produced on firm computers and eliminate any expectation of privacy. Consider a computer log-in screen requiring employees to acknowledge (by clicking "OK"), before gaining access to firm computers, that all data accessed is firm property and that nothing should be considered private.

**Social Media.** You probably had enough of "Facebook firing" stories, so we'll spare you. By now, most employers know that to protect your firm's online image, you should give employees some guidance on firm-related social media use. Can they post their office e-mail address on Facebook next to photos of their wild New Year's Eve party? Your policy should cover everything from prohibiting the disclosure of confidential or defamatory information to the acceptable ways in which social media may be used to promote the firm. Given the growing scrutiny applied by the National Labor Relations Board to such policies, you need to carefully craft your policy and consult with labor and employment counsel.

**Cell Phone Use.** As an employer, you are responsible for all injuries inflicted by employees acting in the scope of their employment. If you issue cell phones or expect attorneys to be available by cell phone, be sure your handbook includes a policy on safe cell phone practices while driving. Texting while driving should be expressly prohibited. While ideally all cell phone use should be prohibited while driving, if this is not feasible, mandate (if possible, provide) hands-free headsets. Finally, expressly state that at no time should anyone use a cell phone if such use could create a danger to the employee or anyone else.

**Streamline Administration.** Most of us would rather do billable work than administrative work. By spending a little time up front documenting administrative procedures, such as expense reimbursement or filing proce-

dures, you can streamline administrative tasks and spend more time on billable projects. If a good handbook saves partners just one hour per week, imagine the yearly cost savings, not to mention the increase to your office morale.

While drafting an employee handbook may seem like a chore, if well drafted, it can help make your workplace more efficient and legally compliant in the long run. A handbook is a great workplace tool, but only if you keep it current and relevant to your practice and use it consistently.

**Paperwork.** Nobody likes paperwork, not even lawyers. But as we all know paperwork can be crucial to winning a case or closing a deal. As employers, proper paperwork is crucial to demonstrating legal compliance and minimizing litigation. Firms need to consider paperwork during the hiring process, throughout employment, and upon an employee's separation. There is a variety of necessary paperwork, so we will provide some general information regarding a few of the most important areas.

You should consider providing new hires with offer letters, as they can be of great benefit to your firm. In addition, be sure to have new hires fill out all necessary paperwork, including tax forms and I-9s.

Personnel files are generally not required but they are a great idea, and if you use them, be sure that the documentation in the file backs up every employment decision you make. You should double check state law, as many states have rules regarding the privacy of personnel files and their contents. Lastly, you must keep medical records, often part of Health Risk Assessments or medical leave requests, separate from all other employee records.

The information in the personnel file can also be useful to justify an employee's separation. If you have to let an employee go, be sure to provide them with the unemployment paperwork required by many states as well as any mandated notices regarding the termination date of employment and/or insurance coverage. By having well-kept employment records, the next time an employee brings an issue to your attention, you can easily point to the documentation justifying your decision. This may help to avoid litigation and avert, or at least streamline, an audit by a government agency.

## Conclusion

If several of these questions left you scratching your head, be glad this was only a self-audit and not a government audit! But what will you do now? Of course, it's not easy to find time to handle these non-billable HR issues while practicing law and trying to woo the next big client. But you need to correctly answer these questions to minimize the risk of costly and time-consuming litigation and government investigations.

Taking time to consider these issues and following some of the outlined steps can not only promote legal compliance, but also create a positive and efficient work environment for you and your employees. As lawyers, we often preach to clients that an ounce of prevention is worth a pound of cure. It's time to practice what we preach!