

## A View from Plaintiff's Side: What Makes a "Good" Employment Case?

Anne C. Martin

Law. *Life*. Passion.

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## Why do current/former employees hire lawyers?

- They got their feelings hurt by how they were treated
- They heard someone else was being treated more favorably and know of a situation in the past that they perceive to be differential treatment
- They know they are in trouble at work and are trying to be preemptive

Law. *Life*. Passion.

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## More reasons current/former employees hire lawyers:

- They don't understand why the company is making a particular decision that affects them
- They want something for nothing
- They have unrealistic views of their role/importance at work
- Management has not communicated well their status/performance level

Law. *Life*. Passion.

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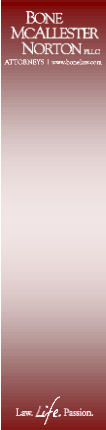
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## Getting fired is very traumatic for employees

- We spend more time at work than anywhere else
- We make many personal sacrifices for professional opportunities
- Our identity is wrapped up in our work/profession
- We need the money
- We need the health insurance
- It is embarrassing

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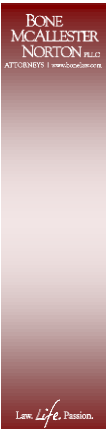
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## Getting disciplined is also traumatic for employees

- They spend a lot of time "waiting for the other shoe to drop"
- They think everyone knows/is talking about them
- It creates adversarial situations in the workplace where everyone is supposed to be working toward the same goals
- Job insecurity is very, very stressful
- It is embarrassing

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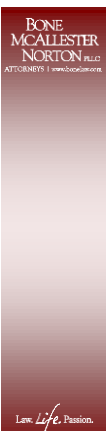
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## There is a lot of misinformation available to individuals regarding their rights and resources available to them

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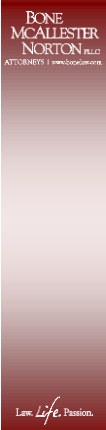
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Employees do not understand the concept of being “harassed” – they think if someone is mean to them that is actionable harassment

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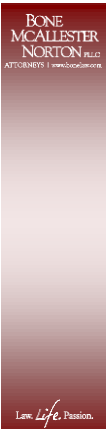
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There is no magic pill to prevent bad lawsuits by disgruntled former/current employees but there are things you can do limit risk as much as possible

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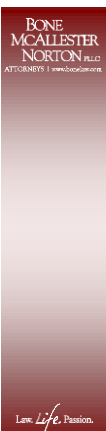
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### Termination Do's and Don't's

- Do be prepared to secure your computers and access thereto
- Do treat people with respect by minimizing attacking their character or intelligence
- Do allow people to “get their stuff” even if it is necessary to meet them on a weekend or after hours
- Do consider letting people take their contacts and personal information on their computers

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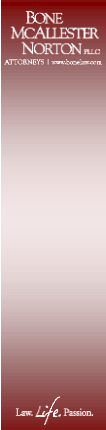
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## Termination Do's and Don't's (cont.)

- Do meet in person, with a witness, and be to the point about the reason for the meeting and the decision made
- Do have all termination paperwork to give to the employee
- Do be prepared to discuss how benefits will be affected
- Do pick a date and time that will minimize the embarrassment for the employee and the distraction for the business

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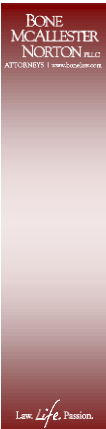
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## Termination Do's and Don't's (cont.)

- Be prepared for difficult subjects and how to respond, including:
  - Worker's compensation issues
  - Pending complaints
  - Recent medical issues
  - Problems with co-workers
  - Concerns about company policies/processes

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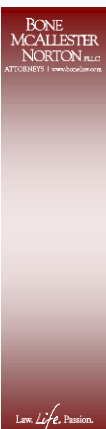
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## Termination Do's and Don't's (cont.)

- Don't ever use the word "retire" when dealing with an older employee
- Don't have a security guard escort the employee out unless absolutely necessary
- Don't tell anyone who does not need to know ahead of time
- Don't digress from the matter at hand
- Don't handle terminations in groups
- Don't let the employee leave with your stuff
- Don't take the company car and leave the employee stranded

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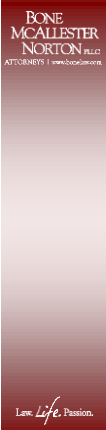
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## Termination Do's and Don'ts (cont.)

- Don't embarrass the employee
- Don't lose your temper with the employee/get into a debate about performance
- Don't make it personal/this is business
- Don't terminate someone on leave unless you have been very clear, in writing, about their status and what is/has been expected of them

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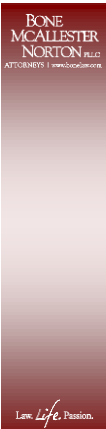
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## Wage and Hour Issues

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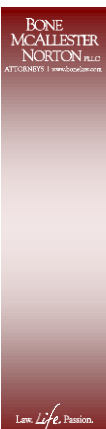
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## Properly classifying employees as exempt

- Executive exemption
- Administrative Exemption
- Professional Exemption
  - Learned
  - Creative
- Computer Employee
- Outside Salesperson
- Highly Compensated
- Business Owner

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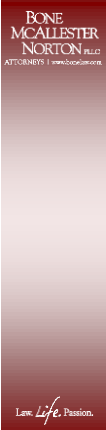
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## Properly classifying employees as tipped wage earners

- Tip pool requirements
  - FLSA allows employers to take a "tip credit" toward minimum wage obligation for those who are customarily and regularly tipped employees including making at least \$30/month in tips
  - Cannot include non-customarily and regularly tipped employees
  - Cannot include managers
  - Employee or potential employee must be notified before working that he or she will be included in a tip pool

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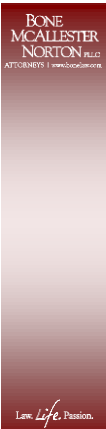
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## Wage and hour mistakes

- Using employees in dual roles or for related organizations without counting hours properly
- Not paying employees for pre and post shift work
- Not having a good time keeping system so all hours can be captured
- Not ensuring management "roll back" of hours is accurate/appropriate
- Charging employees for equipment that will affect minimum wage compliance

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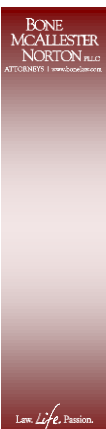
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## Employees v. Independent Contractors

- Both state and federal departments of labor aggressively regulating
- Once they start "turning over the rocks" other problems/issues become apparent
- Difficult to fix problems after the fact v. before they arise

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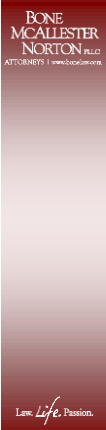
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## Is technology really your friend?

- Computers are a major source of employment issues in the workplace
  - People send things via e-mail they would never say to someone's face
  - People see their work computers as an opportunity for "personal expression"
  - The temptation to look at inappropriate websites and share with co-workers is overwhelming for some

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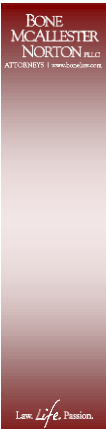
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## Discovery Headaches Created by Technology

- Multiple device usage
- Informality of many communications
- Litigation hold/preservation issues

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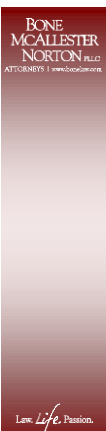
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## Facebook (ugh!)

- Facebooking with subordinates – why it is a bad idea
- Facebooking when hiring – why it is a bad idea

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## Problems resulting from poor employee performance documentation procedures

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## Performance evaluations are great tools if they are done properly

- Do not over inflate your evaluation of employees because it is easier than having difficult conversations
- Do not be inconsistent about providing reviews/how they are handled/maintained
- Ensure supervisors are being consistent with each other and as they evaluate their team

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## Performance evaluations are great tools if they are done properly (cont.)

- Ensure what is evaluated/written in is relevant to the job
- Never refer to age, physical condition or protected status
- Evaluate the entire year, not just the prior months
- Ensure the person doing the evaluation has some history with the employee

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## Interim Evaluations

- Performing interim evaluations or counseling for performance issues is critical
- Appropriate maintenance of disciplinary documentation is critical
- Consistency in performance management is critical

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## FMLA/Leave/ADA Issues

- Failure to consistently apply to employees
- Failure to follow up with employees and keep in touch with them while they are on leave – let them know you care
- Failure to document everything
- Failure to talk like a normal person and use understandable terminology
- Failure to create an opportunity for the interactive process

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## FMLA/Leave Issues (cont.)

- Letting your own bias/experience control your decision making
- Not getting assistance when needed (e.g. calling your lawyer when you need an outside opinion or to control the business team)
- Not being as flexible as is reasonable about how much leave/how the situation is handled

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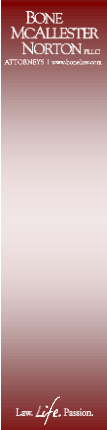
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## Conclusion

- If you are in business long enough you are going to get sued/claims
- Being a good employer and treating employees as you would want to be treated will go a long way
- Early recognition and handling of problem employees is critical
- Most problems are created by front line supervisors/middle managers

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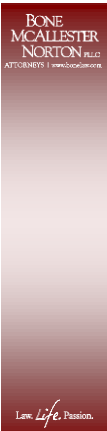
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### Anne C. Martin

Bone McAllester Norton PLLC  
511 Union Street, Suite 1600  
Nashville, TN 37219

Phone: (615) 238-6300  
Fax: (615) 238-6301  
amartin@bonelaw.com

[www.bonelaw.com](http://www.bonelaw.com)

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