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**Employment Litigation From The
Plaintiff's Perspective: Where is your
company vulnerable to attack?**

Anne C. Martin

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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

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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

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

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

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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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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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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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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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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

Wage and Hour Issues

Properly classifying employees as exempt

- Executive exemption
 - Salaried at least \$455/week
 - Primary duty manage enterprise or customarily recognized division
 - Customarily or regularly direct the work of two FTE's
 - Authority to hire and fire or significant input regarding same

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• Administrative Exemption

- Salaried at least \$455/week
- Primary duty office or non-manual work directly related to management or general operations or customers
- Primary duty exercise of discretion or independent judgment

• Professional Exemption

- Salaried at least \$455/week
- Primary duty providing work requiring advanced knowledge in the field of science or learning customarily obtained through a prolonged course of study

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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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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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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

Is technology really your friend?

- Computers have become 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

Discovery Headaches Created by Technology

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

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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 a 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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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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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

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