



# Legal INSIGHTS

with Jeffrey W. Larroca



## *Getting Off on the Right Foot with Employees*

Employing people is hard enough as it is. The Department of Labor diligently investigates whether employees are paid correctly, while the Equal Employment Opportunity Commission and, for federal contractors and subcontractors, the Office of Federal Contract Compliance Programs, keeps an eye on whether an employer is engaged in any alleged discriminatory practices. The Occupational Health & Safety Administration seeks to ensure the safety of employees on the job, while the Department of Justice is tasked with enforcing portions of the Americans with Disabilities Act and the Uniformed Services Employment and Re-employment Act. Moreover, states, counties and cities enforce their own versions of the laws covered by the feds.

With such a battery of regulatory forces arrayed against them, employers should do all they can to ensure that they do not err out of the gate. Here are three "musts" for employers in the beginning of any employment relationship:

### Conduct an Appropriate Interview

We have come a long way from the first episode Mary Tyler Moore Show, when Lou Grant interviewed Mary for a job at the television station and, immediately, offered her a drink:

**Mary:** Has the job been filled?

**Lou:** Yea

**Mary:** Oh . . .

**Lou:** But there is another job.

**Mary:** Oh?

**Lou:** But I figured I'd hire a man for it

**Mary:** Oh . . .

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**Lou:** How old are you?

**Mary:** Thirty

**Lou:** No hedging. How old do I look?

**Mary:** Why hedge? (pause) How old do I look?

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**Lou:** What religion are you?

**Mary:** Mr. Grant, I . . . uh . . . don't know quite how to say this, but you're not allowed to ask that when someone is applying for a job. It's against the law.

**Lou:** Wanna' call a cop?

**Mary:** No.

**Lou:** Would you think it was a violation of your civil rights if I asked if you were

married?

**Mary:** Presbyterian.

Obviously, Lou Grant's over-the-top interrogation style is for comedic effect. That said, employers still misstep early in the process. For example, in the course of conversation, interviewers can often veer into the territories of family (after an interviewee explains that she just dropped her kids off at school), faith (a résumé may list church work as an "interest"), national origin ("Dominguez, where is that from? I'm a Larroca. Puerto Rico"), or age ("the job is technical, and frankly, old guys like us can't even work the toaster"). When a job is not offered, the interviewee may well re-interpret innocent attempts at "getting to know each other" as signs that a protected status interfered with the hiring process. During interviews, heed Joe Friday: just the facts.

### Ensure the Proper Classification

Simply put, some employees get paid overtime. Some do not. The determination of who gets paid overtime and who is "exempt" from overtime requires an inquiry as to the functions and responsibilities of a job. For example, one exemption - the Administrative exemption - mandates that the employee be compensated on a salary or fee basis at a rate not less than \$455 per week; the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. If all these tests are met, then overtime need not be paid. Unfortunately, for many employers, the designation for a particular job is never revisited or analyzed. As such, an administrative assistant is deemed "exempt" solely on custom or the word "administrative" or a job description that is hopelessly out of date. Fast-forward three years, and the administrative assistant is bringing a lawsuit claiming unpaid overtime of five hours a week, for a total of almost 800 hours. He is also asking for statutory liquidated damages (i.e., double the unpaid overtime). His attorney also wants her fees. And there are 25 other administrative assistants who have been similarly misclassified.

### Define the Relationship

And the definition, wherever possible, should be "at-will." It is a simple concept. The employee can leave his or her job at their will, for whatever reason, without penalty. Similarly, the employer can terminate the employee at its will, for any legal reason. Unfortunately, this simple definition often gets garbled in the blizzard of papers and communications that surround a new hire. For example, the offer letter states, "Welcome to ABC Corporation. We guarantee that you will find working for us rewarding and pledge that if you do what is required, you'll be a member of our team for years to come." What was meant to be welcoming language can be problematic when the employee does not "do what is required" and is subsequently fired. He brings a breach of contract suit, and the ABC Corporation says, "it doesn't matter if he did what was required or not. He's an at-will employee. We can release him for any legal reason." But a judge or jury looking at the flowery language of the offer letter may find a "promise" (or, a contract) and there goes the at-will designation. Review communications. Ensure that the term "at-will" is everywhere and that it is explained thusly: "ABC Corporation does not (1) guarantee or promise you will continue to have a job with it for any period of time or duration of employment, (2) promise specific disciplinary steps, warnings, etc., or (3) create enforceable rights with this Employee Handbook. Just as you may quit at any time without having to justify your decision, ABC Corporation is free to conclude its employment relationship with you at any time, even without notice or cause."

The pitfalls for employers are many, but just following these simple rules at the outset can make all the difference.

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