

EMPLOYMENT LAW

Attorneys Speak Out

To learn the complicated ins and outs of employment law, it's best to go straight to the source. The following pages highlight six attorneys that are at the top of their field and are experienced in employment law. These attorneys were each asked to share advice with *Nevada Business Magazine* readers and responded to a series of questions. Business owners and HR professionals can avoid costly lawsuits by heeding the advice outlined in the following pages.



What advice would you give to employers when it comes to hiring, firing and managing employees?



[Employers should] follow any contractual provisions if there is a contract with employee. [They should also] follow the employee handbook even if there is no contract. Courts can impose handbook guidelines as part and parcel of an employment agreement. – **Richard Campbell, Jr., Partner, Armstrong Teasdale**



All discipline – including warnings, formal counseling and performance issues – should be documented. Often employers terminate employees for behavioral or performance problems, but do not have documentation to support the termination. While employment is at-will in Nevada, problems could arise if an employee claims s/he was unlawfully terminated and the employer has no evidence to support its decision. – **Howard Cole, Partner, Lewis Roca Rothgerber**



Employers should be cautious with employee evaluations. We frequently see poor or adequate performing employees receive glowing reviews because employers/supervisors want to be kind or well-liked. This causes problems in termination or discrimination disputes. This does not notify the employee about problems and may need to be explained in litigation. – **Anthony Hall, Partner, Holland & Hart**



The practice of “hiring slow and firing fast” is too-often reversed by many companies, which can be a path to litigation. Extra effort should be made to spend more time on hiring, which will reap untold benefits in day-to-day employee management and help avoid wrongful termination claims.

– **Swen Prior, Partner, Snell & Wilmer**



Employers need to have a plan in place that includes up-to-date policies, accurate performance reviews, and training of all employees, particularly supervisors. Supervisors must know how to evaluate an employee and what to do when they receive an employee complaint. Of course, proper documentation of all employment actions is critical! – **Molly Rezac, Shareholder, Gordon Silver**



Hiring, firing and other management decisions cannot be based on race, gender, religion, disability or other similar protected class. An employer needs to know how to avoid actions or statements that can lead job applicants or employees to believe that they are being unfairly discriminated against because they are in a protected class. – **John Steffen, Partner, Hutchison & Steffen**

What is the most common mistake employers make that puts them at risk for lawsuits?

Not paying attention to harassment by other employees and management. There should be written procedures regarding

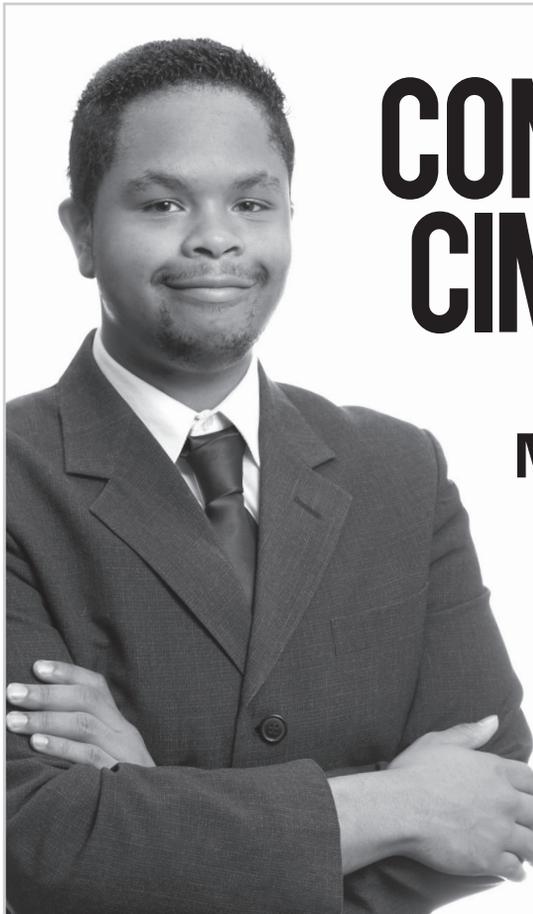
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workplace harassment and it should be dealt with immediately, as soon as it is discovered. Also, if discipline or termination is imposed, the employer should do a detailed investigation with an unbiased person in charge of the investigation. – **Campbell**

Employers commonly make the mistake of failing to train their managers and supervisors on unlawful practices. Managers and supervisors are daily making key decisions regarding employees and they need to be aware of certain statements and actions that violate state and federal laws and subject their employers to lawsuits. – **Cole**

Employers make many mistakes that place them on the fast track to the courthouse door; however, many of these lawsuits could be prevented by adopting practices of clear communication and timely documentation. Thus, employers should make a habit of giving candid evaluations and properly documenting performance issues for all employees. These two practices go a long way toward avoiding claims for wrongful termination. – **Prior**

I find that making decisions too quickly or based upon emotion puts employers at risk for a lawsuit. Employers should investigate and properly document any employment actions before making a final decision. Taking the time prior to making a decision will assist in safeguarding an employer from a lawsuit. – **Rezac**

How have social media and online profiles affected the hiring, firing and managing of employees?

Anything that is public on a social media site is fair game for an employer to consider when hiring and firing employees. Employers, however, cannot dupe employees or prospective employees by befriending them online through an anonymous request. – **Campbell**

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Public information is now more plentiful than ever. This leads to employers discovering inappropriate off-duty conduct, employee histories and more. Employers should be cautious, however, as even innocent searches can lead to information protected by statute. Employers may be wise to implement a use/view policy for these purposes. – **Hall**

Social media provides a plethora of information. Employers must be cognizant of the implication of having all that information—including claims that employees can make. Have a plan in place so that you can use appropriate information off social media but you won't walk yourself into an employee claim.

– **Rezac**

Social media and online profiles create another way for employers to obtain information about employees. Some of this information, if known by an employer, can create a basis for employees to claim discrimination. Employers must be more vigilant in the information they obtain and use in making employee management decisions. – **Steffen**

What are some of the advantages and disadvantages of having an employee manual?

The advantage is that an employer can set strict guidelines for employee rules and regulations that can justify discipline and/or termination. The disadvantage is that these handbooks can be considered as part of the agreement with an employee and not following the handbook could be a problem for a wrongful termination suit. – **Campbell**

An employee manual is a significant advantage to employers as it helps manage the expectations of employees by providing general guidelines for workplace conduct and behavior. An employee man-

ual is only a disadvantage where the employer fails to adhere to those policies and guidelines, especially policies regarding progressive discipline. – **Cole**

Generally speaking, employers should have employment manuals. Establishing and consistently following clear rules are great defenses to employment claims. There are a few downsides to having an em-

ployment manual; however, these are generally outweighed by the benefits of having a good employment manual and following its practices and procedures. – **Prior**

One advantage of having an employee manual is that it creates clear guidelines for employee work-place conduct and

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methods for the employer to follow to handle employee misconduct, complaints and other issues. One disadvantage of having an employee manual is that an employer can open itself up to problems if it does not follow its manual. – **Steffen**

What is an “absolute must” for any employment contract?

An “absolute must” is a severability clause or blue-penciling provision that states if any provision of the employment contract is found to be invalid or unenforceable, such provisions can be modified by the court so as to

render the contract valid and enforceable to the maximum extent permitted by law. – **Cole**

The most important thing for an employment contract is that the terms be understandable, particularly for non-competition provisions and explanations that employment is terminable at-will. If the employment is not intended to be at-will, the contract should clearly define the reasons for termination, even if the topic is uncomfortable. – **Hall**

Generally, formal employment contracts are reserved for key employees such as high-level executives, while the majority of employees should remain employees “at-will.” Employment at-will allows for the most flexibility in employment relationship.

– Prior

Employers should generally avoid having employment contracts that would limit their ability to hire and fire an employee any more than is required by law. Employment contracts should always include language that allows the employment relationship to be terminated for any reason not protected by law. – **Steffen**

What is the most dramatic change you’ve witnessed in the workplace in the last decade?

The last decade has seen exponential growth in employment-related lawsuits, particularly retaliation, age and disability-related claims. In addition, the last decade has experienced a vast increase in the number of class and collective actions based on wage and hour overtime lawsuits that have proven extremely expensive for employers to defend. – **Cole**

How people communicate has fundamentally changed in the last decade with the rise of smartphones and social media. This is true of intra-company communication and communications with clients. Employers need to watch for off-hours communication,

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“Employers must review and constantly update their practices to stay ahead of the game and protect themselves.”

— Molly Rezac

which segues into another issue – the rise of overtime and related claims. – **Hall**

Technology, including a “virtual” workplace and social media, is the most dramatic change I’ve seen. Technology is ever-changing and employers must keep up and factor in how the new technology affects workplace policies. Employers must review and constantly update their practices to stay ahead of the game and protect themselves. – **Rezac**

How do independent contractors fit into the employer/employee relationship? What are some guidelines for employers?

Independent contractor status relieves the employer of a lot of responsibility with relation to laws and regulations governing the workplace. To insure that a person is an independent contractor there are strict guidelines on how to initially set up the contract and then how to treat the person as an independent contractor so the relationship won’t be challenged as an employer/employee relationship. – **Campbell**

The safest course of conduct is to limit the behavioral and economic control a business has over an independent contractor. Employers should be aware that while federal standards for determining independent contractor status are relatively

uniform across the country, they vary between agencies. However, states, and different agencies within states, apply their own standards. – **Hall**

This question explains the problem and misconceptions of when and how to use independent con-

tractors. Independent contractors should be largely independent and analyzed separately from your employment workforce. The consequences of misclassifying an independent contractor can be very costly, so employers should use caution when setting up an independent contractor relationship. – **Prior**

Don’t try to “fit” an employee into an independent contractor role unless you want trouble with governmental agencies. Independent contractors do not do the same work as the employer; they have their own business. Independent contractors may train your sales staff to sell better but the staff itself are employees. – **Rezac**

Employers should take great care in using independent contractors to complete work traditionally done by employees and carefully craft contracts to avoid creating an employee/employer relationship unintentionally. – **Steffen** 🌟

IN BRIEF

The Nevada Policy Research Institute recently released a poll showing 82.9 percent of Nevadans agree that employees have a right to decide, without force or penalty whether to join or leave a labor union. This indicates a strong support for Nevada’s right-to-work principle.

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