

SPECIAL REPORT SERIES

10 LEGAL TRAPS FOR THE UNWARY EMPLOYER (Or How to Avoid Many of Today's Most Common Employment Lawsuits)

"It will not injure you to know enough of the law to keep out of it."

–Old Farmers Almanac, 1851

If you own or manage a business, you live in a world of *substantial risk* and *high anxiety*. One mistake can cost you thousands or even millions of dollars. Most, if not all, of the legal and business nightmares we're about to review can easily be avoided by following a handful of powerful strategies. What follows is a summary of some of today's most significant exposures in the workplace and what you can do to help prevent them.

*NOTE: Any time you see a form, checklist or agreement highlighted, you can download the PDF or Word versions on the **HR That Works** program.*

TRAP #1: HIRING THE WRONG EMPLOYEE

Today's most valuable commodity—knowledge—resides within each of your workers. This makes employees your greatest asset and your greatest liability. Few employers fully appreciate the importance of *hiring only the best*.

A lot can go wrong when you hire the wrong employee:

THE WRONG EMPLOYEE IS:

- Underqualified
- Resistant to change
- Prone to error
- Absent, late or lazy
- Untrustworthy
- Selfish
- Addicted
- Violent
- Unethical
- Unhealthy

THE WRONG EMPLOYEE WILL:

- Create a negative work environment
- Harass or discriminate against co-employees
- Offend customers or vendors
- Quit at the drop of a hat
- Sue your company
- Cause your company to be sued by a third party
- Create bad press
- Use up every day of sick leave
- Steal company trade secrets or other confidential information
- Take business opportunities for his/her own
- File for unemployment or workers' compensation

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If you want to avoid hiring the wrong employee, we suggest you follow these five strategies:

1. Do not hire in haste. If you need somebody right away, then lease an employee, hire an independent contractor or pay overtime. It may be that you do not need an employee at all. You may be able to lease the services you need, ally with a strategic partner or outsource to an expert.
2. If you conclude that you need an employee, look to as many different hiring sources as you can, then carefully screen applicants using *pre-interview questionnaires* and *standardized interview questions*.
3. Use an employment application that is thorough, contains an “at-will” clause, an EEO (Equal Employment Opportunity) statement, and an *authorization for reference checks* and pre-employment testing.
4. Conduct extensive reference checks, including those with past employers, as well as background checks on driving, criminal and credit records when appropriate. If you don't feel qualified to do this, hire an outside agency to do it for you. We recommend www.globalhrresearch.com. Tell 'em we sent you and they will take good care of you.
5. Conduct post-offer, pre-hire “fit for duty” physicals, which include drug testing. See our report on *Pre-Employment Medical Inquiries*.

While there are additional strategies, these are the most important ones to help avoid hiring the “wrong” employee.

TRAP #2: TREATING AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR

Thousands of businesses make the mistake of treating an employee as an independent contractor so they can save money on taxes and benefit coverage. Some “lay off” employees only to hire them back as independent contractors, then expect not to have responsibility for payroll deductions, insurance benefits, or third-party liability claims. Yet the risks associated with this approach are often not worth it.

There are many horror stories associated with companies who've fallen into the independent contractor trap. In one case, an independent contractor was involved in a motor vehicle accident while on work time. The company was held responsible for the accident, but because they did not treat the driver as an employee, they were prevented from claiming coverage under their insurance policy. Likewise, tax penalties associated with misclassification far exceed possible tax benefits.

Many businesses treat employees as independent contractors because they fail to fully understand the distinction between the two. The most important difference is whether or not you can *control* how they do the job. Other factors, such as where they perform their work, whose equipment they use, how they are paid, and if there are set hours, also play an important role.

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If you are interested in an in-depth discussion on this topic, please go to the website www.1099timebomb.com.

To avoid a claim of misclassification, you should follow these five strategies:

1. Have independent contractors sign an *agreement* acknowledging their status.
2. Make sure independent contractors have their own business licenses, tax identification numbers, places of business and other clients.
3. Allow independent contractors to control the manner in which they perform their work. According to the IRS, it makes a difference whether you “instruct” the worker or merely give “suggestions” as to how the work might be performed.
4. Don’t hire former employees and treat them as independent contractors. If necessary, hire them through a leasing agency.
5. Treat workers as employees if you have any doubts about their classification, or ask for a letter ruling from the IRS.

TRAP #3: LOSING “AT-WILL” PROTECTIONS

Under the laws of most states, employees are hired on an at-will basis. This means you can terminate them at any time, for any reason, with or without notice, and with or without cause. Case after case is litigated over verbal promises made by employers that cause them to lose the protection of at-will employment. Employees who file lawsuits claim they were told they could only be terminated for “good cause,” were promised lifetime employment or a partnership interest in the business, or were hired under *false pretenses*.

The easiest ways to maintain the at-will employment relationship are as follows:

- Use an at-will clause in your *job application*, employee handbook, benefits documents, employment contracts, and other employment related documents. Use an *Offer Letter* to make it clear to that the only promises they can rely on are those in writing.
- During the hiring process, don’t promise more than you can deliver, especially if you are hiring an employee away from another job or a different city.
- Train your managers so they understand the importance of maintaining at-will employment. Make sure they know not to make promises the company has no intent being obligated to.

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TRAP #4: FAILING TO HIRE, PROMOTE OR MAINTAIN THE EMPLOYMENT OF QUALIFIED WOMEN AND MINORITIES

Too many employers fail to understand the *value of a diverse work force*. By embracing diversity, companies allow themselves to choose from a larger pool of qualified candidates, who in turn bring a wider perspective to concepts such as innovation and customer service. This also helps to guard against “inbreeding” and stagnation, as well as the inevitable discrimination lawsuit.

We suggest the following strategies:

- Encourage qualified women and minorities to apply.
- Train your employees on the value of diversity. Let them know diversity enriches the quality of life, enhances workplace creativity and improves customer sensitivity.
- Encourage trust and communication between employees—characteristics of success in any relationship.
- Conduct a *compliance survey* at least twice per year to make sure no complaints of discrimination are festering.
- Have clear policies and procedures designed to prevent harassment and discrimination. Include grievance, investigation and disciplinary procedures.

TRAP #5: IGNORING THE ISSUE OF SEXUAL HARASSMENT

The number of sexual harassment claims filed against employers *quadrupled* during the nineties and represents approximately one out of four claims filed against employees. Since harassment is viewed from the *victim's standpoint*, if someone “reasonably believes” conduct to be sexually hostile or harassing, then he or she has grounds for a lawsuit. You can expect these claims to continue through the new millennium with new twists and turns.

If your company is ever accused in such a case, your only defense is to have done something about it as soon as you could have. It is therefore imperative for today's companies to follow many of the same strategies just discussed related to managing a diverse workforce.

Your company must:

- Deliver a message from its president or CEO indicating that sexual harassment will not be tolerated.
- Have a well-defined sexual harassment policy.
- Promptly and thoroughly investigate claims.
- Engage in appropriate discipline.
- Conduct a *compliance survey* aimed at nipping the problem in the bud.

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For a more in-depth discussion and strategies for avoiding these claims, please see the *Training Module for Sexual Harassment*.

TRAP #6: CONDUCTING A LAYOFF OR DOWNSIZING WITHOUT EXPLORING ALTERNATIVE POSSIBILITIES

A large number of employees who file claims do so within the context of a downsizing or layoff (also known as reductions in force, re-engineering, rightsizing, etc.). *Age discrimination* claims are particularly common due to the disproportionate effect layoffs have on older workers. Not surprisingly, there is a nationwide backlash to the layoff issue.

Seldom is a company savvy enough to ask employees what alternatives they see to their potential layoff, such as a reduced workweek. There are dozens of alternatives that should be explored before conducting a layoff or downsizing.

Potential lawsuits are not your only concern. The “brain drain” associated with layoffs contributes to the fact that less than half of all companies are more profitable two years after a layoff or downsizing. The loss of valuable workers and their knowledge should make layoffs one of the most unappealing alternatives, yet downsizing is the “easiest” (and most shortsighted) solution for many companies.

Here are five strategies you can use to minimize or prevent the legal impact of layoffs:

1. Do not wait until the last minute to let employees know there is a problem.
2. Let employees know the numbers. If they fully understand your financial status and objectives, they are more likely to help you create solutions and less likely to take personal offense in the event of a layoff. Take a look at www.ggob.com and learn about open book management.
3. Focus on growth potential before cutting yourself off at the knees. Perhaps your products and services are not in demand and need to be reconsidered. Perhaps your marketing strategies need an overhaul. Ask the employees and other stakeholders for suggested solutions.
4. Try a “shared layoff” with reduced salaries or work hours across the board. Most employees would rather face a reduction in pay or hours than the prospect of no job at all. Consider keeping the structure but changing the system. This way, you keep the intelligence, avoiding brain drain and inevitable lawsuits.
5. If you are going to make changes, then do so quickly and fairly. Be prepared to handle the emotional and financial dislocation and employee grievances.

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TRAP #7: SAYING THE WRONG THING

One of the most explosive litigation areas is that of *defamation, slander and libel*. For the most part, conversations held between one person who has a legitimate interest in a subject matter to another are cloaked with a “conditional privilege,” which prevents the filing of any defamation claim. However, in most circumstances, this privilege can be defeated by showing that statements were made *maliciously*. What you say may also amount to a different tort, such as intentional infliction of emotional distress or misrepresentation.

Courts have allowed defamation claims associated with performance appraisals, disciplinary notices, termination, references to prospective employers and off-the-cuff statements made to employees, customers and vendors.

For example, one school district sued another because it hired a teacher who had been terminated as a result of sexual molestation allegations, yet given a favorable letter of recommendation. As you might guess, the former employee had repeated his conduct, and his new employer sued, claiming the letter of recommendation amounted to a misrepresentation.

Since someone’s intent in saying or doing something is usually a question for a jury to assess, companies find themselves defending against a whole variety of claims in this area. It is important to control communication unrelated to the company’s mission or purpose, both within and outside of your company, and to make a concerted effort to limit comments about your employees or another business—unless you’re willing to be sued over it.

To avoid claims of defamation and the like:

- Be honest when letting someone go. Tell them “why”, so they don’t assume the worst.
- Require a departing employee to sign a release if they want you to provide a reference that goes beyond name, rank and serial number.
- Make sure your communications about an employee are with people who have a “need to know,” that they are work related and objectively stated.
- Make sure your employees “own” their performance, discipline and termination. Let them help define performance expectations and outcomes.

TRAP #8: FIRING SOMEBODY THE WRONG WAY

There is an amazing lack of sensitivity on the part of many companies when terminating an employee. The fact is, most terminations are as much the fault of the employer as they are the employee. Sometimes the situation is just a poor fit, sometimes the company hired the wrong person and sometimes the system or manager caused the problem.

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Most employees who seek out legal advice are motivated to do so primarily by the emotional aspects of being “unjustly” terminated. Financial retribution becomes the primary motivator only when attorneys get involved and the former employee comes under attack.

If you are going to terminate an employee, make sure:

- You fully understand why the employee did not work out. What managerial factors played into the equation? Where was the breakdown in trust, direction or communication?
- You have followed your policies, procedures and written guidelines.
- You treat the employee in a similar fashion to other similarly situated employees.
- There has been an independent review of the termination decision.
- If you have any questions about the legitimacy of the termination, you contact an attorney first.
- Attempt an *exit interview*. Even if you have to pay for it!
- Do not provide a severance that you have not agreed to in advance unless you receive a release of claims in return.
- Acknowledge the emotional and financial loss employees will suffer as a result of being terminated. Unless they were dishonest or deceitful, make an effort to help them find new employment.

Employees will ask themselves if their termination was fair. How you treat him or her will affect how that question is answered and determine whether or not your company will be sued.

For help in this area, take a look at the *Pre-Termination Checklist* and *Discipline and Termination Module*.

TRAP #9: FAILING TO ACCOMMODATE A SICK OR DISABLED EMPLOYEE

If you have more than 15 employees, you are subject to the Americans with Disabilities Act (ADA). (If you are in California, a similar law applies if you have 5 or more employees.) If you have more than 50 employees, you are subject to the Federal Family and Medical Leave Act (FMLA). In many states, you are subject to similar statutes. You can expect to face a very expensive lawsuit if you fire someone who is sick, obese, depressed, HIV positive, injured on the job, or otherwise prevented from performing their work due to limitations created by their sickness or disability, or that of a family member. For example, a jury awarded \$1 million to a plant manager who was fired because he was so depressed he could not do his job. Another jury awarded \$1 million to a 400-pound clerk who was terminated for his obesity. A Michigan court actually ruled the ADA prevented a company from firing a depressed employee who swore at her boss and threatened to kill her! (Fortunately, that case was reversed on appeal).

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You must follow specific procedures when disciplining, demoting or terminating employees who are sick or disabled. This is a complex area of law, even for attorneys. Trying to manage it on your own will most likely end up in disaster.

What to do:

- There are many strategies you can use when confronting this type of issue. One of the most powerful is to request the employee show how they can continue to add value to your company despite the sickness or disability and without causing harm to your continued operations.
- Another strategy is to focus on the greatest value the employee can bring to your company, and reduce responsibilities to those specific functions. For example, the company could have accommodated the depressed plant manager by reducing his hours and finding out what his most valuable contributions were, and asking him to do only that. Chances are, the company could have hired someone at a lower rate of pay to pick up the less important responsibilities, thereby avoiding a lawsuit and saving money at the same time.
- Lastly, because the law is so complex, we recommend you call an attorney or contact a federal or state agency for assistance. This is no game for amateurs.

TRAP #10: LOSING TRADE SECRETS AND OTHER PROPRIETARY INFORMATION

Many companies allow hard-earned proprietary information to easily slip away in the hands of departing employees. Don't let this happen to your business.

Every business has trade secrets and proprietary information. You must *identify* and *protect* it. Proprietary information can include customer lists, marketing strategies, inventions, compensation plans, production systems, business plans and financial reports. Confidentiality agreements, copyrights, patents, trademarks, non-solicitation agreements, exit interviews and other means can protect it.

To avoid this trap your company must:

- Identify your proprietary and trade secret information. It may be the uniqueness of your product or services, your production or delivery methods, marketing approaches, or your customers and vendors.
- Make efforts to protect proprietary information by using copyrights, patents, trademarks, services marks, and other forms of protection.
- Protect access to information from internal and external sources. Watch your document storage, e-mail, and garbage.
- Have your employees, customers and vendors sign trade secret, non-solicitation, confidentiality, work-for-hire and other agreements.

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- Avoid unnecessary voluntary disclosures through trade fairs, journals, speeches, marketing and other means.
- What's more, be careful not to hire an employee who is improperly taking another company's confidential information, as you may end up getting sued in the process.

The ***Lawsuit Free!*** program for preventing today's employment lawsuits goes over some of these traps in detail, as well as 19 other traps for the unwary employer. The ***Lawsuit Free!*** approach provides unique benefits because it focuses on strategies aimed at preventing problems from occurring in the first place, whereas most attorneys can only tell you what the law allows you to do once a problem has occurred. For more information on the ***Lawsuit Free!*** program, which is part of HR That Works, visit our web page at www.hrthatworks.com.