

SPECIAL REPORT SERIES

THE NUTS AND BOLTS ON HOW TO FIND, CHOOSE AND WORK WITH AN EMPLOYMENT LAWYER

*“When you have to pick a lawyer, look in his eyes for honesty . . .
These days when you pick a lawyer . . . you never know what will happen.”*

– Larry Bird, NBA player and coach

There are at least 30,000 attorneys claiming they practice employment law in this country. Statistically speaking, what holds true for any profession, holds true for employment lawyers. Half of these employment lawyers are above average and half of them are below average! How do you distinguish one from the other? How do you find out what lawyers or firms are the very best? What questions should you be asking?

Don't underestimate the impact a lawyer can have on your risk management exposure. There is the presumption that lawyers know what they're doing. How valid is this presumption when roughly two-thirds of employment lawsuits filed against companies result in a plaintiff's verdict or when defense attorneys turn down reasonable settlement offers only to lead their company into disastrous results?

Lawyers are trained in *adversarial relationships*. It's the *fight* most of them are familiar with. It's their reference for conflict resolution. Don't let a lawyer's viewpoint undermine the effort to create a powerful culture at your company. Most lawyers know very little about how you run your company or the message you want to communicate to your workforce. Remember, a lawyer who mishandles your employment law case can cause a great deal of damage to you and your company—and not even come close to committing malpractice.

Few business owners or managers are savvy about choosing counsel. Most of the time they are too intimidated to ask questions and if they're not intimidated, they simply don't know what to ask. It's very similar to dealing with a doctor or computer wiz. Businesses hire the wrong lawyer for the same reasons they often hire the wrong employee—they're either lazy, desperate, infatuated or rely blindly on a referral/recommendation. Hiring a good employment law attorney is like hiring a good employee. You must go through a *powerful hiring process*. You can't downplay its importance, nor hire in haste. Do not fall trap to fancy degrees and elaborate furnishings. Find a lawyer who is focused on getting your case resolved, including the use of alternative dispute resolution.

If you don't already have a relationship with a lawyer, where do you go to find one? We would suggest you begin by going to www.worklawnetwork.com. You could also look at jury verdicts. Who in your area has successfully prosecuted or defended an employment law claim? If they've done it once, chances are they can do it again. Your local law library should have a collection of jury verdict research reports that you can research to find an employment lawyer.

Lawyers can also be found by looking at ratings services such as Martindale-Hubble. A problem with these ratings services is that they are geared towards large law firms and their progeny. If you run towards the safe haven of the large firm, you must be prepared to pay a

handsome price. You should also consider the various referral panels run by Bar Associations in your city, county or state, or get a referral from a lawyer you know.

As indicated in this report, prepare a chronology of facts and present it to more than one lawyer. See how each lawyer analyzes the facts and see what preliminary advice they give you. Find out what legal hurdles you can anticipate, and what the approximate cost of representation would be. Properly shopping for a lawyer is a confidential affair and you'll get plenty of sound advice in the process.

THE FOLLOWING LIST SHOULD BE CONSIDERED WHEN WORKING WITH A LAWYER:

1. ***Do you practice employment law full time or part time?*** Think twice before hiring an attorney who does not practice employment law at least half of the time.
2. ***How long have you been practicing?*** Think twice before hiring an attorney that has been practicing employment law for less than 5 years. While we are not averse to an associate working on our case, I only want them to do so under the direction of an experienced employment lawyer.
3. ***What type of cases do you handle and what type of results have you obtained?*** Don't be afraid to ask these questions. Get specific.
4. ***Who have been some of your clients and may I contact them for a reference?*** See if they have a familiarity with companies such as yours and then make the effort to follow up on the reference. Hiring an attorney is no different than hiring an employee; the greatest benefit will be obtained from the effort you place on the front-end of the relationship.
5. ***What professional associations do you belong to?*** Are they a member of the local bar association? Are they a member of any employment law sections at a local, state or federal level? Are they members of a trial lawyers association? What efforts do they make to keep themselves up on the latest changes in personnel laws and litigation strategies?
6. ***Always look to see if you have insurance coverage that will pay for your lawyer.*** Look for an "employment practices" policy or rider. These policies may require you use a lawyer appointed by the insurance carrier. Just make sure they have your best interests in mind and don't skip the hiring process.
7. ***Are they members of any insurance defense panels?*** With the advent of employment practices liability insurance, many an insurance company has gone through the effort of identifying firms they wish to work with. One word of caution: Many insurers use nationwide law firms simply because of their breadth of coverage. Other insurers prefer to use local firms, as they tend to be more cost effective and responsive to client needs. If your company has risk exposures in many different states, a nationwide firm may be in your best interest. You may also consider the WorkLaw Network at www.worklawnetwork.com. If your exposures are related to your locale alone, then the premium associated with hiring the large law firms may not be justified.

8. ***Are they likeable?*** You can have the most technically competent attorney in the world with an emotional quotient of zero. Make sure you like your attorney. Make sure that potential jurors will like your attorney. We have witnessed many a trial where the personality of an attorney destroyed a client's case.
9. ***What are their billing arrangements?*** Find out what the partner rate is, associate rate, paralegal rate and perhaps even secretarial rate. What are their billing minimums? Find out if they work on a flat-fee or retainer basis. Consider negotiating a bonus or reduction in fees based on a particular outcome. Then study any bills you get and don't be afraid to ask questions.
10. ***What ancillary services do they provide?*** A well-rounded employment lawyer should conduct compliance audits, compliance training, policies and procedures reviews, employee handbook creation, etc. These are of great benefit in preventing claims and one of the best ways to use an attorney.
11. ***Have they written any books or articles?*** If they have, read a few of them. What is their compliance philosophy? What area of employment law do they seem to know best?
12. ***What is their current caseload?*** Find out the number of files they are currently managing and if they truly have time to devote to your concerns. The best attorneys can't spend their whole day working on your case. The best attorneys do an effective job of delegating tasks that are not within their "highest and best use". Find out what system they use for delegating their caseload.
13. ***Ask what their annual billable hour requirement is.*** If over 2,000 hours, find a new attorney. Look for something in the 1,800 to 2,000 hour range.
14. ***Review their fees agreement.*** Make sure any understandings you reach are clearly memorialized in writing.
15. ***You may want to consider going to the courthouse Records Department and researching the lawyer's past cases.*** You can do this yourself or have an investigator or legal service do it for you.
16. ***Make sure they have an insurance policy.*** We would even go so far as to make sure we know what the company name is and policy number is before we hire someone.
17. ***See to it that they sign the Client Bill of Rights.*** You've received their contract, now provide them with yours. You can obtain a sample Client Bill of Rights agreement by [click here](#). If they won't sign the Client Bill of Rights, then consider going elsewhere.
18. ***Employment law is one of the most complicated legal areas.*** An employment lawyer has to remain familiar with over 25 different acts passed by Federal and State legislatures, as well as more than one hundred years of common law. That is why it is important to make sure the lawyer you talk to about an employment case is an experienced [employment lawyer](#). They need to specialize in employment law to be any good at it.

19. **Consider hiring an employment lawyer on retainer so that you can have a flat rate for unlimited consulting.** Taking such an approach will reduce your likelihood of making a poor personnel decision, which could result in an employee lawsuit.

MANAGING THE RELATIONSHIP

Now that you've got your experienced employment law practitioner, how do you manage the relationship? We would begin by asking that question of the attorney. What has been their pattern or practice? Attorneys with insurance defense experience tend to run their practices differently than those without. The former tend to have more structured relationships. We suggest the following inquires:

1. **No one knows more about your case than you do.** It is your job to educate your lawyer. Even when we have thought we asked all the questions possible, we find ourselves surprised to learn about an important factual event during the course of litigation. Often times it is a fact that our client is "embarrassed" about and does not think will come to light. If the other party has a good lawyer chances are very little will remain hidden. Therefore, it is imperative you let your lawyer know *all the facts* let them decide whether or not they should be deemed relevant.
2. **Be careful who you talk to about your lawsuit!** Any conversations you have that are not with your lawyer are not protected. The general rule is: the fewer people you speak to about a case, the better off you are.
3. **What is the battle plan?** Whether you like it or not, managing claims is like going to war. While you certainly are willing to negotiate some form of equitable resolution, you have to be prepared for all out conflict. Your attorney should provide you with an overall strategic plan, which indicates their intentions as well as reflects yours. The plan should include many of the below items.
4. **Find out who will be doing most of the work on your case.** Will it be a paralegal, a junior associate or the lawyer you hired? Who will handle the case when he/she is ill, on vacation or in trial?
5. **We cannot overemphasize the importance of preparing a detailed chronology of events to present to your lawyer.** It is the single most important tool in helping analyze a case. When you have gathered *all* of your facts early on in litigation, it assists in discovery efforts as well as trial preparation. It is important that you be both thorough and absolutely honest when preparing the chronology. You need to disclose to your lawyer any negative events as well. If properly handled, any document you prepare in the "anticipation of litigation" will be deemed a confidential and privileged document. You may wish to provide your lawyer with a bland version of a chronology to give them a flavor of your case, and then afterwards, in cooperation with your lawyer, provide a more detailed version that will be a privileged and/or protected document.
6. **Pull together all the documents that may relate to your case.** Place them in date order and make sure they're consistent with your chronology. The chronology should include within it any document that relates to your case. Therefore, if you produced a dismissal memo on

April 16, you would have an entry on that date in your chronology and a document with its corresponding number. Don't forget related E-mail documentation.

7. ***DO NOT WRITE ON ANY ORIGINAL DOCUMENTS!*** If you want to write notes for your lawyer or for personal purposes on any documents, make sure that you copy the document first or use "post-it" notes.
8. ***What do they know about the opposing attorneys involved?*** If they haven't dealt with them before, what can they find out? What has been their track record? Do they specialize in employment litigation? For how long? Do they like to litigate or settle cases? Are they courtroom savvy or right out of school?
9. ***What attempt will be made at an early resolution of the claim?*** Speak with your attorney about the possibility of mediation or arbitration. If you are interested in the **White Paper: Mediation and Arbitration** please [click here](#). Statistics indicate that 85% of all mediation efforts resolve claims. Hopefully you won't be one of those 10% of claims that end up going to trial.
10. ***What is the cost benefit analysis associated with this claim?*** Find out what the possible range of settlement and verdicts can be in a case like yours. One way to do that is to obtain past settlement and verdict reports of similar cases in your jurisdiction. Find out what the likely cost of defense will be through the various stages of litigation. If you aren't familiar with the litigation process then [click here](#) to receive a **Special Report: The Nuts and Bolts of an Employment Lawsuit**.
11. ***Lawyers, like anyone else, go through an analysis when they determine the value of a case.*** There are even software tools that can be used to help analyze a settlement or verdict range. For the most part, a lawyer will try to obtain a settlement or verdict range for the case by taking the following steps:
 - a. Establish general and special damages, such as loss of income, medical bills, etc.
 - b. Determine the possible costs of trying the lawsuit. Most employment attorneys bill between \$150 and \$500 per hour. Depending on its length, a single deposition can cost thousands of dollars. Experts are another matter. For example, in wrongful discharge type cases, you may have a management expert, psychologist and economist. Expert fees also range between \$150-\$500 dollars per hour. You will also end up having to pay to depose the other party's experts. It is not uncommon for an employment law case that goes to trial to cost \$100,000 or more to defend.
 - c. Establish the verdict range based on jury verdict research or focus groups.
 - d. Discount that range on the basis of liability issues (unless a party has admitted its liability, the liability probability will be less than one hundred percent).
 - e. Determine based on a-d above, as well as your financial and emotional needs, what a realistic settlement or trial value would be.

12. ***What is the discovery plan?*** What documents will they request? What witnesses will they depose and what investigations will they make? This is an area where you have to be actively involved with your attorney. The fact is, no one knows more about your case than you do.
13. ***Meetings and reporting.*** At what interval will your attorney keep you apprised of the case status? Do you want a memo once a month, once every three months or never? Do you want to have meetings on the phone or in person and at what regular interval?
14. ***Make sure you receive detailed monthly statements.*** Each statement should identify the following:
 - a. Each task billed separately in 1/10 of an hour increments;
 - b. Any charges for computer processing or computerized research;
 - c. No more than \$0.25 per copy or \$1.00 per fax;
 - d. Charges for paralegal or secretarial time including overtime;
 - e. Charges for lawyer meals;
 - f. No billing for excessive interoffice conferencing; and
 - g. Only one lawyer's time billed to the same or similar work.
15. ***Use of experts.*** What experts will be required to defend your case? Typical experts include human resource experts, accounting experts, psychological experts, and vocational experts. How much will these experts cost, what are their credentials, what are their experiences testifying at trial and what is the cost/benefit associated with their use?
16. ***Discuss the hidden costs of litigation.*** There has been many a litigation matter where counsel for the employer, through their adversarial nature, caused exacerbated stress, mistrust, etc. amongst the workforce. For example, in one case, the way in which counsel attacked the performance of a trusted manager, who was fired and who sued the company, actually had the effect of causing four subordinates to quit. At a cost of employee replacement of approximately 100%, replacing those four employees cost the company close to \$250,000! This is a cost that did not show up on the lawyer's bill and actually ended up costing the company more than the settlement negotiated. Word to the wise – make sure any attorney you hire does not interfere with the positive relationships developed at your company.
17. ***Do not get yourself caught up in whether or not you “win” your lawsuit.*** If you feel you are “right”, then no judge or jury should change the image you have of yourself or your company. Look at the time, expense and emotion associated with trying the case. There are interrogatories to answer, documents to gather, depositions to take, examinations by experts, lawyer meetings and trial time. You will undoubtedly involve your employees, family and friends. You will have to go through the experience of having the lawyer on the other side attempt to make you out to be some form of bad person. Be forewarned that the lawsuit

process often creates more victims than it compensates.

18. ***Keeping confidences.*** Be very clear with your attorney as to your expected confidences. Let them know who you would like them to talk to and who you'd like them to keep out of the picture. Litigation should be approached on a "need to know" basis. Make sure the attorney notifies you before they discuss any aspects of your case with colleagues, at seminars, or in publications.

A NOTE ABOUT THE "WAR BETWEEN INSURERS AND DEFENSE LAWYERS"

The October 5, 1998 Lawyers' Weekly USA *In Practice* article of this title started out as follows:

The insurance companies and their defense lawyers, once brothers-in-arms against the plaintiffs' bar are engaged in a bloody civil war over the use of independent auditors to scrutinize lawyers' bills. It's an absolute war out there between defense counsel and insurance carriers' says Doug Lawless, lawyer in an 8-lawyer defense firm in Sarasota, Florida.

Some of the lawyers' complaints, which remain consistent today, were as follows:

- Independent auditors are nickel-and-diming them to death, rejecting legitimate charges because of technical infractions of the billing format.
- There are increasingly complex billing guidelines, regulating everything from the time allowed to write a brief to the number of lawyers who can attend a deposition, thereby compromising a lawyer's independent judgment. On top of that, many insurers have different rules, only adding to the complexity and administrative expenses.
- Certain matters, such as short phone calls, are being rejected as "nominal" and therefore not payable. The lawyers say it's simply not worth fighting over rejected bills because of the nature of the appeals process.
- Lawyers complain that providing auditors with detailed statements may affect the lawyer/client privilege and thereby expose case strategy to an opponent. This, they claim, is a potential ethics violation.
- Lawyers claim that auditors have their background in accounting and not in the law.

Many law firms, both large and small, are walking away from insurance defense work. Others purposely choose cases that don't involve audit firms. Lawyers claim that as a result, the quality of insurance defense work is eroding.

In response, the insurance companies claim that lawyers have no one to blame but themselves. They point to the following:

- Auditors frequently cite double-billing, inappropriate billing and phantom billing.
- Legal auditing provides objectivity and consistency in working with defense counsel.
- As a result of analyzing the audited data, they can provide additional information to the insurance companies as well as defense counsel, leading to "best practices" and better claims management.

- Once the lawyers learn how to properly log their time, they won't find themselves fighting with the auditing services.

Much of this sounds like the never ending managed care debate going on in the medical community. Managed care firms have taken many of the financial incentives out of practicing medicine. This, claim insurance companies, forces professionals to focus on their "highest and best use" and to farm out all other services. It arguably creates efficiencies that benefit the consumer, thereby preserving scarce capital resources. Of course, the professionals argue that it comes at a high price to the quality of care rendered, whether by doctors or lawyers.

This "battle" will be interesting for insurance companies offering employment practices liability insurance. Since it is a relatively new coverage area, they have relatively little experience with risk management profiling and "best practices." At the same time, very few lawyers practicing in this area are used to cutting their fees to appease a third-party standard. How this affects you, the insurance consumer, is something to keep in mind.

As with medicine, the tightening of the legal services dollar will force more clients and consumers to seek "alternative remedies" to avoid the system altogether. This is a good thing. Hopefully the legal profession will take note of these trends, whole-heartedly embrace them and look for the new opportunities they create.

CONCLUSION

We sincerely believe that the most critical decision you can make when it comes to defending against an employment claim is in choosing your lawyer. The skill range of lawyers varies as widely as it does for violinists and secretaries. Half of them are above average and half of them are below average. Your job is to only hire the best.

By following the suggestions set forth in this report, you will guarantee yourself a lawyer who will serve your best interests. The effort you make will be well rewarded.

Client Bill of Rights

As your advisor I agree to do the following:

1. Provide considerate and respectful services.
2. Only work on your behalf if I have the skills, knowledge and experience necessary to provide excellent service.
3. "Tell it like it is." To be open and honest with you in all transactions.
4. To act on your behalf in the most dignified manner possible and conform to all ethical guidelines.
5. Communicate. That means I will be an active listener, return phone calls as soon as possible and provide regular case status updates.
6. Work on your matter in a timely manner so that it may be resolved as expeditiously as possible, with as little conflict as possible.
7. Place all fee agreements in writing.
8. Fairly bill you only for actual time, fees, and costs incurred and to provide detailed billing statements.
9. Preserve your confidences, honor your privacy, and only disclose the facts of your case, or other matters, to persons on a 'need-to-know' basis.
10. Remain current on the laws and legal trends related to your matter.
11. Properly maintain all financial books and records related to your matter and account, including billing statements, cost ledgers and liens.
12. Maintain and store your records in a place which is secure from theft and unnecessary access, and which is protected against the possibilities of fire, water damage and the like.
13. To promptly release client files upon demand.
14. *Additional Request(s) by the Client:*

Date: _____

Advisor's Signature: _____

Date: _____

Client's Signature: _____