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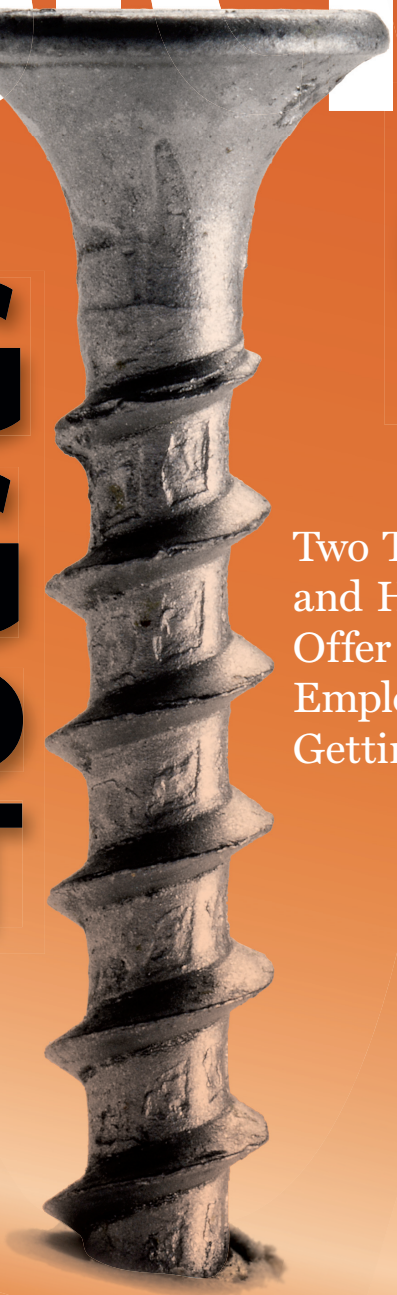
HIRING FIRING & HOW TO NOT GET



Two Top Employment and Health Care Attorneys Offer Tips for Handling Employees Without Getting Sued.

PLUS

Best Practices for Managing Employees

e-Prescribing: The Myth and the Reality

Just the Facts: Nutrition

Key tips from two top employment and health care lawyers

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VIRTUALLY EVERY medical practice has employees, whether other physicians, nurses or office staff. While physicians rightly fear being sued for medical malpractice, or for a HIPAA violation, the reality is that your practice is more likely to be sued by a disgruntled current or former employee. However, unlike malpractice suits, there is no MICRA-like cap on damages in employment lawsuits in California. And if the practice loses the case, it may also be liable for the employee's attorneys fees (which can dwarf the actual damages the employee is awarded).

The stakes are high. Medical practices are being hit with wage and hour claims, including suits for failure to pay overtime and to provide rest or meal breaks, as well as lawsuits for wrongful termination, discrimination and harassment. Medical practices are subject to additional legal risks because California law protects employees who advocate for patient care. Just last December, a Riverside County jury awarded more than $1.6 million to a supervisory nurse at a community hospital who said she was fired for disciplining subordinates while trying to improve patient care. The hospital had argued that the nurse was fired for bad behavior, including yelling at subordinates and using inappropriate language in the workplace. But the jury concluded that the nurse's "patient advocacy" was a key reason for her firing.

To reduce your legal exposure every medical practice should have at least a basic understanding of the requirements of California and federal employment law with respect to hiring, managing and terminating employees.

Facts About Hiring

THERE IS MORE TO HIRING than simply "feeling good" about a prospective employee. You need to ask the right questions and do the right research. And, of course, there are the legal issues to consider.

Employment Applications and Interviews.

ANY EMPLOYMENT application that your office uses should be reviewed by an experienced employment lawyer. Do not assume that an "off the shelf" employment application that you purchased online has been properly vetted for use in California. For instance, an obscure provision of California law prohibits employers from asking job applicants about marijuana-related convictions which are more than two years old. National employers such as Starbucks have been sued in California for using employment applications that ask for disclosure of *all* criminal convictions—a fairly typical and, in most states, lawful question.

Generally, applicants cannot be asked about arrests not leading to conviction (although employers can ask if the applicant is currently out on bail awaiting trial in a criminal matter). There are exceptions for health care facilities like hospitals who admit patients for stays of at least 24 hours. These facilities may ask applicants who will have access to patients about arrests for sex-related crimes and may also ask applicants who will have access to medications about drug related arrests.

Pre-employment drug screening is generally legal in California. (This is in contrast to post-employment testing, which can only be done in extremely limited circumstances). Employers usually conduct pre-hire drug testing after making an employment offer, with the offer contingent upon the applicant passing the drug screen.

To avoid complaints of discrimination and about the job-relatedness of a pre-employment testing program, employers should be consistent when testing applicants entering the same job classification, and not selectively test only certain applicants in a job class.

In an interview you cannot ask an applicant health-related questions since this could be construed as an attempt to screen out disabled applicants. Questions designed to elicit information about marital status, pregnancy, national origin, age, etc. are similarly off

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limits. Nationwide, more health care facilities (including the Cleveland Clinic) are refusing to hire smokers. But such a ban may not be lawful in California where the law prohibits an employer from discriminating against an employee for lawful conduct occurring during nonworking hours away from the employer's premises.

Employee vs. Independent Contractor

EXCEPT IN VERY limited circumstances, medical practices should not attempt to hire full-time physicians and staff as independent contractors. Virtually anyone who will work for the practice full-time must be hired as an employee. Virtually anyone who will work for the practice full-time must be hired as an employee. Even part-time non-physician staff must usually be hired as employees. The key is whether the practice has direction and control of the person. If it does, then the person needs to be hired as an employee. The copier repairman is an independent contractor; the file clerk is not. Improperly characterizing someone as an independent contractor can expose the practice to substantial liability to the IRS and the Franchise Tax Board for unpaid payroll taxes, plus interest and penalties.

At-Will Employment

ALL EMPLOYEES in California are presumed to have been hired at-will, which means they can be terminated at any time, with or without cause and with or without advance notice (just as the employee is free to quit at any time without advance notice). Of course, this presumption can be negated if the practice enters into an agreement promising employment for a certain length of time and/or permitting termination only for good cause. Further, even an at-will employee cannot be terminated for an illegal reason, such as racial discrimination.

Although the presumption of at-will employment applies in the absence of a written agreement to the contrary, it is only a presumption. Therefore, we recommend that practices require all employees who are not being hired for a specific period of time to sign an acknowledgement of their at-will status. While larger practices usually have an employee handbook which contains the requisite at-will acknowledgement, even a sole practitioner who does not have an employee handbook should have all employees sign a simple acknowledgment of at-will status. Where there is no employee handbook, the acknowledgement of at-will status should be given to all new employees to sign on their first day of work as part of a new hire package.

Unauthorized Overtime

MEDICAL PRACTICES should have a written rule that any overtime must be approved in advance by a supervisor. It is not permissible, however, to refuse to pay overtime to an employee who breaks the rule. An employee who works unauthorized overtime should be counseled, disciplined and, if necessary, terminated; but the employee must still be paid for all overtime hours. In no circumstances should a non-exempt employee be told to simply record 40 hours regardless of the actual hours worked.

Personal Phone Calls, Web Surfing, etc.

INTERNET SURFING can be controlled to some extent by installing software that blocks access to websites such as eBay, Amazon and other shopping sites. Alternatively, a practice can install monitoring software that monitors all websites visited by computer users and the time spent at each site. *The use of such monitoring software should be clearly and prominently disclosed to employees in writing.* If employees have work email addresses, it is also important to advise them in writing of the practice's right to review all emails sent or

received on the practice's email system. Some employees may try to circumvent this by using personal webmail domains to send or receive email, such as Gmail, Yahoo! Mail or Hotmail. However, access to those sites can be blocked through software. Alternatively, a practice could advise employees that they may not access those sites at work to send personal email and use tracking software to monitor whether those Internet addresses have been accessed. Most draconian of all, a practice could use keystroke software to monitor all keystrokes on the practice's computers, which would monitor even the contents of emails sent through personal email addresses. However, a practice should consult with experienced employment counsel before deploying keystroke software in the workplace. Medical practices may also have a rule that personal cell phones may be used only during breaks.

Monitoring Social Media

YOU MIGHT ASSUME that a medical practice could flatly prohibit employees from commenting about the practice on social media, such as Facebook or Twitter. However, that is not necessarily the case. Recently, the National Labor Relations Board brought a complaint against an ambulance company that fired an employee who referred to her supervisor as a mental patient in Facebook posts made from her home computer. According to the NLRB complaint, the discharge violated federal labor law because the employee was involved in a protected activity when she posted comments about her supervisor and responded to co-workers' comments. The ambulance company agreed to settle the claim on the eve of trial and to revise its policy that barred workers from disparaging the company or a supervisor. While the NLRB case is not a binding precedent, practices should consult with counsel in developing social media policies.

Discrimination and Harassment 101

IT IS NOT UNCOMMON to hear disgruntled employees complain that they are being "harassed" at work. Usually, what the employee means is that he or she is being yelled at and/or is subject to unreasonable demands. Yelling at employees and making unreasonable demands may lead to workers' compensation stress claims; but "harassment" that is actionable outside the workers' compensation system has a very specific definition.

Both California and federal law protect employees and applicants for employment from discrimination and harassment. We will focus on California's somewhat broader definition of discrimination and harassment. California prohibits discrimination or harassment "because of" race, color, religion or creed, national origin or ancestry, physical or mental disability, medical condition (which means a diagnosis or history of cancer or having a genetic abnormality, even though not presently sick) marital status, sex, age (40 or over), sexual orientation (including perceived sexual orientation) and gender identity for example, transgender status). Discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth or related medical conditions.

While screaming in the workplace is never advisable, an employee who is yelled at will not have a civil action for harassment unless he or she can prove that the shrieking occurred *because of* the employee's race, sex, national origin, etc. But while screaming and bullying are not unlawful *per se*, courts have allowed lawsuits to proceed where female employees alleged either that women in the office were yelled at more frequently and in a harsher manner than male employees or where the yelling was alleged to have included sexually pejorative terms.

Employers can also be liable for bullying of employees by co-workers where the employer knew about the bullying and failed to take corrective action. In one recent jury verdict, a Los Angeles jury awarded over $1 million to a licensed vocational nurse who claimed that his co-workers harassed him and refused to help him with patients because of his national origin, religion and perception that he was gay. Medical practices need to be aware that they can be liable for harassment of their employees by third parties, including patients, if they knew or should have known about the harassment and failed to take corrective action. For example, you should take seriously a complaint by the receptionist about an overly flirtatious patient.

All California employers are required to provide employees with written information about the illegality of sexual harassment (curiously, the law only applies to sexual harassment, not to harassment on the basis of other protected characteristics), including the employer's procedures for reporting such harassment. Employers with 50 or more employees are required to provide their supervisors with sexual harassment training every two years and new supervisors must be trained within six months of initial employment or promotion to supervisor status.

Please note that even physician-shareholders or partners may be entitled to invoke the protection of the laws against discrimination and harassment. On their face, California and federal anti-discrimination laws only apply to employees, and not to partners or shareholders. But some courts have found that where the partners or shareholders did not have true power and say in running the partnership or corporation, they would be treated as employees for the purposes of the anti-discrimination laws and could sue for discrimination or harassment.

Out of the Office

MANAGING LEAVE can be one of the thorniest issues for a medical practice. Employers with 50 or more employees within a 75-mile radius are subject to the federal Family Medical Leave Act and the California equivalent, known as the California Family Rights Act. Under FMLA and CFRA, covered employers must provide employees who have worked at least 1,250 hours in the prior twelve months with up to 12 weeks of leave for the employee's own illness, the illness of certain specified family members and for birth and care of the employee's child or placement with the employee of a child for adoption or foster care. (There are also special rules that govern leave where a family member has been called to active duty in the U.S. National Guard or Reserves or where leave is to care for an ill or injured family member who is in the military).

Even employers with fewer than 50 employees may be required to provide substantial leave.

First, all California employers who employ *five* or more employees, are required to provide up to four months leave to a woman disabled on account of pregnancy, childbirth or a related condition. A woman is not automatically entitled to the full four months' leave, but rather only for the period of disability, up to four months. (If an employer is covered by FMLA/CFRA, a pregnant employee may be entitled to 12 weeks, plus 4 months of leave—or close to seven months of leave).

Second, all California employers with five or more employees are required to provide "reasonable accommodation" to disabled employees. One reasonable accommodation is to provide unpaid leave. Where a disabled employee is requesting a leave of absence due to the disability, the employer must provide the leave unless it can show that doing so would create a hardship or undue burden. Hardship or undue burden is determined on a case-by-case basis. The best advice is to call your attorney before denying a request for leave.

In considering a request for leave, it is also important to remember that the disability discrimination laws do not just cover employees

with pronounced disabilities such as blindness, deafness or being in a wheelchair. Rather, court decisions have found a broad and sweeping array of conditions, including temporary conditions, to be covered. Virtually anything short of the common cold could be considered a covered condition under California law—for instance, a back injury, depression or high blood pressure. We recently defended a disability discrimination lawsuit where the claimed disability was conjunctivitis!

Because of the duty under the disability discrimination laws to provide reasonable accommodation for disabilities, a covered employer may have to provide more than the 12 weeks of leave mandated under FMLA/CFRA or the four months leave mandated for pregnancy and childbirth. For instance, we recently counseled a medical group with less than 50 employees where an employee took the full four months of pregnancy leave and then requested additional time based on a statement from her doctor that four months after the birth, the employee was suffering from post-partum depression (a condition covered by the disability discrimination laws). In this circumstance, denying the request for additional leave would have placed the employer in the position of needing to prove that granting the additional leave would have so severely disrupted the medical practice as to have constituted an undue hardship.

Disability discrimination claims are on the rise. The federal Equal Employment Opportunity Commission's latest statistics show record levels of disability discrimination complaints—more than 25,000 in Fiscal 2010. Disability discrimination claims rose faster than any other type of discrimination complaints, jumping 17 percent from the prior year. These statistics demonstrate why it is especially important for practices to consult their attorney before denying an employee's request for leave or refusing reinstatement after an employee has taken leave.

Overtime and Breaks

CALIFORNIA IS ONE of the few states that has its own laws governing overtime and mandating that non-exempt employees be provided with certain minimum specified meal periods and rest breaks. There are also federal laws governing overtime. This means that California employers must comply with both state and federal law.

All employees who are not properly classified as exempt must be paid overtime and provided an uninterrupted 30 minute meal break and two 10 minute breaks for each four hours (or major fraction thereof) worked. In the case of an employee working more than 10 hours a day, a second meal break may need to be provided, although the second meal break can be voluntarily waived if the total workday is less than 12 hours. Non-exempt employees must be paid time and a half for all hours over eight in any workday or over 40 in any workweek, and double time for all hours over 12 in a workday. (There are special additional rules that apply if an employee is working a seventh consecutive workday).

The determination as to whether an employee can be properly classified as exempt from overtime is not always straightforward. The three exemptions that are most likely to apply to a medical office are the managerial exemption, the administrative exemption and the professional exemption. Medical practices should consult a qualified employment law attorney before classifying any particular employee as exempt. The fact that an employee is paid a salary rather than an hourly wage does not automatically make the employee exempt from overtime requirements. Rather, in each case, the employee's actual duties must be examined. Moreover, even if an employee's duties are of an exempt nature, to retain the overtime exemption, an employee (other than a physician) must be paid on a true salary basis. This means that there are very strict rules governing when salary deductions can be taken for missed work.

Special rules govern overtime for physician employees. Physicians do *not* need to be paid on a salary basis in order to qualify for an overtime exemption provided that they are paid at least $69.13 an hour as of January 1, 2011. (The rate is reviewed annually).

Generally, registered nurses do not qualify for an overtime exemption, although in *certain circumstances* certified Nurse Practitioners may qualify. The same holds true of Physician Assistants. However, even where nurse practitioners and physician assistants qualify for the overtime exemption based on their duties (which should not be assumed), unlike physicians, they must be paid on a salary basis. In January 2011, a federal court in the state of Pennsylvania ruled that, under federal law, a Physician Assistant who was paid $50 an hour did *not* qualify for an overtime exemption because he was not paid on a salary basis.

Writing Them Up

EVEN FOR AT-WILL employees who can be terminated without cause, the practice should carefully document any performance deficiencies. It is important to take your time when preparing this documentation which may become an exhibit in a legal proceeding one day. While it may not be feasible to contact the practice's attorney every time an employee is to be written up, if possible, another practice supervisor should review the documentation before presenting it to the employee or putting it in the personnel file.

Final Paycheck

IF AN EMPLOYEE is being terminated, the employee must be given his or her final paycheck on the spot, which must include all accrued unused vacation time or Personal Time Off. If an employee quits without notice, the employer has 72 hours to provide the final paycheck. Any proposed deductions from the final paycheck (other than regularly recurring payroll deductions) may be illegal; therefore, they should be discussed in advance with your attorney.

If an employee is not timely provided with their final paycheck or if any required amounts (such as vacation or PTO) are not included on the final paycheck, the employee is entitled to so-called "waiting time" penalties. Waiting time penalties are a day of wages for each day that the employee did not receive the proper final paycheck, up to a maximum of 30 days. In the case of a highly paid employee, waiting time penalties can be substantial. For instance, we were involved in a case where a highly compensated physician employee alleged that his final paycheck did not include all accrued unused PTO to which he was entitled. The employee, who was earning $325,000 a year, brought a lawsuit for 30 days of waiting time penalties—which totaled $37,500. (Because of the peculiarities of the formula for calculating waiting time penalties for a salaried employee, 30 days of penalties will always exceed one month of pay if the yearly salary were merely divided by 12).

The Ending

THE TERMINATION MEETING with the employee should be handled carefully. We recommend that the practice representative who will be speaking to the employee have at least one witness attend the termination meeting. You are not required to tell the employee the reason for the termination. Instead, if asked, you can say that the practice is exercising its right to terminate at-will. Although not required, in other cases, it may make sense to provide the employee with detailed reasons for the termination.

If an employee is being terminated for cause, you should never characterize the termination as a layoff. While wishing to avoid conflict is a natural human instinct, characterizing a termination for cause as a layoff can make any resulting lawsuit more difficult to defend.

We were recently involved in a lawsuit where several employees were told they were being laid off because the employer needed to reduce its personnel costs. However, several months after the lay-off, the employer hired a new employee in the same job classification. One of the laid off employees sued for age discrimination, arguing that the layoff was a "pretext" for getting rid of older workers. Moreover, if you characterize a termination as a layoff, in any ensuing lawsuit, you may be required to produce the financial books and records of the practice in order to support that economic cutbacks were necessary.

If possible, you should consult with your attorney in advance as to the best way to handle the termination, including what to say and what not to say.

Right to Inspect Personnel File and Payroll Records

ALL CALIFORNIA EMPLOYEES have the right to inspect their personnel file and payroll records. This right also applies to former employees if their request is made before the expiration of the statute of limitation on any employment law claim they may have (which can be up to four years). In addition to the right to inspect, employees and former employees are entitled to copies of any document they have signed. Because an employee may one day be inspecting his or her file, the practice should treat employee personnel files with the same care as it treats patient charts and files.

EPLI Insurance

ALL CALIFORNIA EMPLOYERS are required by law to carry workers' compensation insurance. However, this kind of insurance only protects you against claims brought by injured employees before the California Workers' Compensation Appeals Board. Moreover, if an employee brings a claim before the WCAB asserting that he or she was terminated or retaliated against for asserting a workers' compensation claim—what is known as a Labor Code Section 132a claim—your workers' compensation carrier will]not provide a defense to that portion of claim, but will instead require that you hire your own counsel to defend the retaliation claim at the WCAB.

Many medical practices purchase what is known as Employment Practices Liability Insurance insurance, to cover certain kinds of claims brought by employees, including retaliation claims filed at the WCAB. Generally, EPLI will provide coverage for claims such as wrongful termination, discrimination, harassment and defamation, but not for other kinds of employment claims such as claims for breach of contract or failure to pay wages.

Many malpractice insurance carriers offer EPLI coverage. You should speak with your insurance broker about the available options. Be sure to read the fine print of a proposed policy carefully so that you understand exactly what is covered and what is not. Also be aware that under the typical EPLI policy, the lawyer who will defend you will be chosen by the insurance carrier regardless if you do not know, like, or even want the lawyer. You may be able to obtain a rider allowing you to select your own counsel (to be paid by the insurance company); but this needs to be negotiated in advance.

You Are an Employer

ALMOST EVERY medical practice is an employer. As such, practices run the risk of violating the very complicated rules governing employment relationships. In order to avoid potential liability for treating employees improperly, all practices need to be familiar with California and federal employment law requirements.

Contact Miller Health Law Group in Los Angeles at www.millerhealthlaw.com.

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