Same advice, 30 years later: Employers win by avoiding lawsuits

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In the summer of 1986, I went into the offices of the Richmond News Leader to meet with a young, recently promoted editor, who had been given the task of creating a new supplement, Metro Business. I was there to try to persuade him to include a column about employment law, directed toward managers. That editor, Tom Silvestri, listened and gave me a shot, and I thoroughly enjoyed writing the columns for several years. Tom was just starting on his career path—he is now president and publisher of The Times-Dispatch. Every time I see him at a community event, I think how his responsibilities have expanded and evolved over the years. Me? Thirty-plus years later, I'm doing the same thing as I was then—working with employers to help them understand and comply with applicable employment laws, in an effort to avoid the disruption, expense and uncertainty that accompanies employment litigation.

Some parts of law practice have changed so much that new lawyers cannot comprehend the extent to which it has changed over 35 years. When I started practice, law offices had no personal computers, fax machines, FedEx, internet, email, or cellphones. I was a sole practitioner, and law firms with 100+ attorneys were rare—there were only two in Virginia. When the Labor & Employment Law section of the Virginia Bar met, it was only a few dozen of us, and most were on the management side. The attorneys who began taking on cases for employees were primarily labor lawyers (who had represented unions) or civil rights advocates. Today, however, I have the good fortune to be part of a national, 900-attorney firm representing management in labor, employment, employee benefits and workplace immigration matters. Now, many attorneys working in this field are on the other side—dedicated to representing employees, and recovering fee awards that accompany a victory. Often, in employment litigation, attorneys' fees become the locomotive that is driving the train.

Nonetheless, the substantive parts of my advice-and-counselling practice haven't changed that much. In fact, my first Metro Business column, appearing on Labor Day 1986, was entitled "From employment at will to the fear of firing." My next column began with a quote from the Harvard Business Review, "Even if managers no longer have an unqualified, sweeping prerogative to fire, they can adapt to new conditions and live with the law if they can understand and predict it." Over the next month, I wrote a couple of columns, "Code of conduct for avoiding sexual harassment" and "Avoid office relationships to avoid breaking law." While those stories refer to cases in which the awards had been much smaller, and they were decades ahead of the #MeToo movement, they otherwise could have been published last week.

Although some statutes impacting the employment relationship have been around for a very long time—the Fair Labor Standards Act dates back to 1938, the National Labor Relations Act to 1935, the Federal Arbitration Act to 1925—even today, the Supreme Court is called upon to interpret the text of those laws. Some of the more recent enactments—the Americans with Disabilities Act of 1990 and the Family and Medical Leave Act of 1993—were portrayed as clear and simple to enforce when they were enacted, but have proven to be problematic in practice. Many claims for protection go far beyond what Congress contemplated in seeking to prohibit discrimination and ensure protection in those laws.

As I told employers many years ago, if you don't get counsel until the lawsuit is served, or the EEOC charge is received, or the Wage & Hour investigator has arrived, or a union representation petition is submitted, then you have missed the chance to really win. You may prevail in the lawsuit, but it will be only after significant disruption and at great expense. Employers really can win these areas only by avoiding the dispute, which is best accomplished by being aware of applicable law, adopting sound and reasonable policies, training managers, and responding proactively and appropriately to issues that arise in the workplace.

Long ago, a very senior partner in a small firm responded to concerns expressed about the fairness of a proposed action with: "Fair? Fair comes to town in October! What's the law?" Well, today, I remind clients that when jury instructions are given at the end of a trial, there will be no instruction on the issue of fairness, but you can bet that fairness is the unspoken standard that will be applied by a jury as they evaluate the action taken by the employer.

Those columns I wrote in the 1980s included some sound advice: "Reviewing your policies and procedures, and training your supervisory staff, will go a long way toward reducing vulnerability." "Conduct an internal audit to make sure that exempt employees qualify for such classification, and that all hours worked are being properly compensated." "The defense of discharge claims must begin long before anyone says, 'You're fired!'" While some aspects of the practice of employment law have changed a great deal, some have not. The benefit of avoiding litigation is even greater today than it was then.

Jackson Lewis P.C. represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies.

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