

A Host of Legal Headaches for HR: Immigration, Whistleblowers and Workplace Violence

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The following article is based on a panel presentation at The HR Network, which is sponsored by the Five O'Clock Club. The HR Network is a vendor-free venue for HR professionals to meet informally and hear discussions of important issues of the day.

The panelists were three attorneys: Charles H. Kaplan of Lowenstein Sandler; Andrew R. Lerner of Paparelli & Partners LLP and J. Michael Riordan of Greenberg Traurig.

The Burdens of Human Resources

A couple of decades ago, an American recruiter traveling in Europe was shocked to find blatantly discriminatory want ads in a local newspaper. Most of the ads included such stipulations as “white male, age 25 to 30 needed for this position.” When the recruiter expressed his shock about this to his host, he was told, “Well, what’s the point of not making it clear right from the beginning whom we want to hire?” Of course, it’s hard to argue with this

logic—given the underlying morality...or, clearly, the lack of moral sensibility. But this episode does bring home the truth that the American workplace, by contrast, is today highly regulated. There’s a lot that we’re not allowed to get away with. That old American cliché that “it’s a free country, isn’t it?” is actually pretty meaningless. Our actions must always be limited and qualified by ethics and concern for the well-being of everyone—and in business and commerce especially, we are not allowed to do as we may please in a so-called free country.

And whether they like it or not, human resources officers have become custodians and watchdogs of the regulations. HR has found itself playing a key role in communicating with senior management and corporate legal counsel to ensure that regulations are followed and that company behavior remains within the law. In this article we will look briefly at what HR should be paying attention to with respect to immigration law, the treatment of whistleblowers and the preven-

tion of workplace violence.

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Toleration of Illegal Immigration Buys Trouble

There may be an assumption that widespread illegal immigration is simply part of life now; there may be huge frustration at the failure of immigration reform on the federal level; there may still even be talk of sanctuary cities; but no organization can afford to be on the wrong side of the law in this arena. And it’s certainly true that both HR professionals and lawyers—who are responsible for achieving compliance—face a horrifying tangle of bureaucracy and law. As one expert described the situation: “There are three governmental agencies involved: the Departments of State, Labor and



The early birds got to mix and mingle before the program started. They were assigned to a host who introduced them to other HR professionals.



J. Michael Riordan, of Greenberg Traurig, addressed domestic violence and bullying in the workplace.

Homeland Security. These don't talk well to each other. The regulatory frameworks for each don't necessarily complement each other, and we are obliged to deal with regulations that either don't fit well with the statutes or statutes that simply don't exist. So the practice of immigration is gray at best, and for anyone who is obsessive about doing things the correct way—dealing with all this is not a wonderful daily experience. HR professionals who find themselves in this spot need competent counsel to help navigate through it all.” Although the topic is enormous and complex, here are a few suggestions for keeping your head above water in this area.

Make sure you are part of the recruitment process from the very beginning. This may sound so obvious. But there is the nightmare scenario of a senior executive saying, “Please hire this guy—just take care of the details—this is a favor for a friend of a friend.” But it turns out that the details have to do with his lack of work authorization status. One of the roles of HR is to educate senior executives about the liabilities to the organization of trying to skirt the regulations—and leading candidates to believe that complex immigration issues can be fixed.

Go the extra mile in being I-9 compliant. Who doesn't require all employees to fill out I-9 forms? But that's not good enough. One authority recommends: “At least every six months do an I-9 review. Do a random check. Take 25 I-9 forms and send copies of them to your immigration counsel to make sure you're not

doing anything wrong. This is a relatively small thing to do, but if you are ever audited, such small things can count for a lot. This practice shows good faith on your part to conform to the law.”

No organization can afford to be on the wrong side of the immigration law.

Read documents carefully before you sign. “Well, of course,” you may say. But documents produced by immigration counsel are usually complicated—and you may be working with attorneys whom you don't know well, because they're involved in the process at the request of an employee. Hence, attention to detail is mandatory. One seasoned attorney warns: “We all get busy and crazy, and we expect the professionals we work with to know what they're doing—but it is very important not to just sign off on papers. You are signing on behalf of your company, so you want to make sure that what you're signing doesn't misrepresent the company. I have seen documents that made me wonder, ‘How could have an attorney written this?—and how could an employer have signed off on it?’ It's very embarrassing to claim later that you didn't take the time to examine the document thoroughly.”

Be alert to changes in your company's corporate structure. If your company is going through a restructuring, merger or acquisition, this can have an impact on an employee's maintaining proper status—and it is up to HR to pay attention to possible evolutions on this front.

Employees with E or L-1 status especially might be affected by how a company is structured—or who is owned by whom. Says one immigration lawyer, “There have been cases where I discovered, quite by chance, that an employee was out of status: ‘Oh yes, our situation has changed. We are now owned by X corporation.’ And I have to do a lot of backtracking to figure out how to get the person back in status. HR needs to be aware—and keep immigration counsel

aware, so that such issues can be handled in an appropriate way.”

Scrutinize the activities of those entering the U.S. in the B-1 Visa Waiver category. When you have people coming in with this authorization who work for affiliates or subsidiaries overseas, be aware that they are visitors. Make sure that what they coming here to do is okay. The more you deal with these situations, the more you'll acquire a knowledge and sense of what is allowed. Usually these visitors are admitted for meetings, conferences and negotiations. Certain activity is appropriate, but they are not allowed to work here in a formal sense—and, to avoid trouble, you need to be aware of what isn't appropriate.

HR must educate senior executives about the liabilities of trying to skirt regulations.

Keep track of your foreign national family members. If you don't look out for the rules and regulations that apply to everyone in the family—and keep all parties informed—your employee might end up being resentful or unhappy. For example, family members of those who are in this country under E status may not travel. If they do, their staying in the U.S. will not continue to be approved—and family members are more difficult to keep in step. You are not obligated to keep everyone in the family fully informed of the law, but if you want to avoid headaches, it is good practice to do so.

Whistleblowers: Getting at the Truth and Minimizing Damage

One of the concerns prompting the passage of the 2002 Sarbanes-Oxley Act was the protection of employees who tell the truth. As was observed at the outset, in the context of the workplace we are not free to do as we please as individuals. The kind of idealized loyalty that is expected among friends (and, it could be added, in old-boy networks and ghetto gangs) cannot be tolerated in a business environ-



Charles H. Kaplan, of Lowenstein Sandler, addressed whistleblower complaints and the new employee retaliation claims.

ments. In this age of a terror-alert populace, we are encouraged, “If you see something, say something”—and that kind of concern for the greater good (it counts for more than hiding fraud and corruption, or worse) is encouraged by legislation. Consequently, of course, retaliation is punishable by law.

Consequently, as well, HR professionals find themselves facing huge complexities. When wrong-doing has been revealed by an employee (at least the accusation has been made) and, given the human tendency to get even—to retaliate—further wrong-doing is overwhelmingly likely. Of course, corporate attorneys must play a major role in working through such crises, but since this is a case of monitoring what employees have done and might do, HR officers are commonly in the middle of the fray. There are several

steps and procedures to bear in mind to be prepared.

Increase awareness among your management team as to what a whistleblower complaint is—and the full potential for damage. One authority on the matter advises: “If an employee says that someone in the finance department is cooking the books, or if someone else claims that there is a safety problem—and points out that people have been complaining—they are raising issues of potential unlawful or even dangerous activity by the company. These are matters that need to be addressed. And don’t overlook the fact that the people who speak up may become targets internally for reprisal. The company becomes liable on more than one level, and the whole management team needs to be educated about the full range of risks.”

Make sure what you sign does not misrepresent the organization.

Investigate promptly. Of course, there’s always the problem of separating reliable information from rumors, and from what some folks might be saying to stir up trouble. In other words, you must make a determination if the case has merit. But there’s no such thing as an employee making a serious allegation, but “it’s just between you and me.” One



Andrew R. Lerner, of Paparelli & Partners LLP, gave detailed advice on handling current immigration trends.

lawyer has commented: “If an employee reports that there have been serious misstatements in the company’s financial reports, but ‘I’m just telling you off the record,’ that can’t be treated as a secret between buddies. That would be just like telling you off the record that sexual harassment or race discrimination are being tolerated. “Off the record” will not protect you. Likewise, the SEC or the Department of Health are not going to care if you heard something off the record. Once an employer, as represented by the HR officer, for example, has knowledge—or even alleged knowledge—you have to look into this.”

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Document your investigation and keep the whistleblower informed.

Once a complaint has been made, and you are confident that it has merit, all correspondence about the matter must be documented. Keep careful notes on telephone conversations and store all emails. One expert recommends: “Preserve all of the applicable records concerning the complaint and the employee making the complaint. If any employee charges later that he or she is being retaliated against—and you don’t have the records about how you dealt with the employee—that



Fortunately, each speaker provided extensive handouts to supplement their intensive presentations.



Kate Wendleton moderated this lively discussion.

could be a real problem. This could be considered exfoliation or destruction of evidence, and courts and judges don't appreciate that at all." You have to be proactive in preserving evidence, by the way. If your system deletes emails automatically, stop the deletions.

Don't keep the complainant in the dark. Naturally, the full details of your investigation don't have to be shared, but it is important to keep the lines of communication open. The person knows that he or she has taken risks to alert management to a harmful situation, and needs assurance that things are not being swept under the rug. It's important to keep everyone in the loop. It's also important, by the way, to be conscious of the difference between retaliation and discipline. One employment counsel pointed out: "Just because someone has blown the whistle doesn't mean that he should not be disciplined for not doing his job or for misconduct. But be sure to establish a record that your disciplinary action is

based on job performance."

Create policies that welcome alertness, candor and measured responses. In other words, as an HR officer, help your employer anticipate the whistle-blower problem. Develop an ethics policy, establish a complaint-reporting procedure, and have training programs, in particular with additional training for supervisors and managers on how to handle people who lodge complaints *without retaliation*. One lawyer points out the value of this approach: "Generally retaliation occurs when people are upset and shoot from the hip. When people are trained about the risks of dealing with employees who have made a complaint, then you don't have so much to worry about."

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Addressing the Problem of Workplace Violence

Whether we work in calm environments (a library, perhaps—or a research lab) or crazy environments (the floor of a commodities exchange), we would like to feel that we are safe when we go to work. But most of us are painfully aware that, with the current state of the world, workplace safety cannot be taken for granted: most commercial buildings now have the security desk in the lobby because security has become a major concern. Terrorists flying airplanes into office buildings is

undoubtedly at the extreme end of the spectrum. Much more common, tragically, is the lone gunman who walks into a university, high school or shopping mall and starts firing. "Going postal" entered our language in the wake of multiple shootings at post offices.

Then there is domestic violence that spills into the workplace, e.g., an abusive spouse shows up at the office to carry on a fight that started at home. Of course, most of us do get through most of our normal work days without witnessing violence. But that doesn't mean that workplace violence isn't a problem. According to one study, violence occurs in 4 per cent of all private industry establishments. Maybe that doesn't sound like a lot, but there are millions of such establishments. Of all workplace fatalities, violence (as opposed to, say, fires or broken elevators) accounts for 10 per cent of them. One of six violent crimes occurs in the workplace. One study has reported that every day there are 16,400 threats of violence at work, and 723 workers are attacked.

Perhaps at the low end of the scale—but not to be minimized—there is bullying, or being subjected to verbal abuse. According to one study, 45 per cent of all U.S. workers said that they had worked for an abusive boss, and the abuse was so bad that 64 per cent of these folks suggested that they would like the chance to fight back in court. Few people actually go that route, but one expert has pointed out that abused employees do fight back when they serve on juries or arbitration panels. Juries can have a tendency to



HR professionals mulled over how increasingly complex their jobs have become in light of legal issues presented by the panel.