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DECISION MAKERS SUMMIT

Human Resources Law

Practical Workplace Issues

prepared and presented by

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South Carolina Rural Water Association
2018 DECISION MAKERS SUMMIT
Saturday, February 24, 2018
Embassy Suites Hotel, Kingston Plantation
Myrtle Beach, South Carolina

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MICHAEL D. MALONE

Mike Malone is a partner in the law firm of Malone, Thompson, Summers & Ott L.L.C. which limits its practice to representing employers and insurance carriers in labor and employment, immigration, and employee benefits matters. Mr. Malone's practice includes the representation of both public and private sector entities. He is a graduate of the University of South Carolina School of Law, co-author of "Labor Relations," South Carolina Jurisprudence (an encyclopedia of South Carolina Law published by the South Carolina Bar primarily for other lawyers), co-author of Employment Law for South Carolina Lawyers (1999, 2004 & 2007), co-author of four "Religion in the Workplace" articles which appeared in the June 1998 edition of the national Labor Law Journal (CCH), co-author of "Potentially Violent Employees: Minimizing Risk in the Workplace," Murray State University Journal of Business and Public Affairs (2006), and a member of the South Carolina Bar's Labor and Employment Law Section and the Richland County Bar Association. Mr. Malone has been Certified as a Specialist in Labor and Employment Law by the South Carolina Supreme Court. He is admitted to practice before the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit. *Law & Politics* Magazine listed Mr. Malone as one of South Carolina's top labor and employment lawyers in its 2008-2014, & 2017-2018 South Carolina *Super Lawyers* publications.

In addition to defending employers against charges of all types of discrimination, Mr. Malone's practice focuses on the delivery of practical and preventive employment law advice. He regularly advises employers with regard to wage and hour law, discipline, reductions in force, Americans With Disabilities Act, Family and Medical Leave Act, drug testing, and a range of other employment law issues. Mr. Malone is routinely called upon to review employer personnel policy manuals/employee handbooks and to develop and revise individual personnel policies. He is frequently invited to speak to employer groups and to conduct supervisory training for individual employers.

Malone, Thompson, Summers & Ott L.L.C. has offices in Columbia, South Carolina and Charlotte, North Carolina, and is an affiliate of the Worklaw® Network, the nationwide network of management labor and employment law firms. The firm is listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers.

"AT WILL" EMPLOYMENT

EMPLOYMENT AT WILL

A. "Employment At Will" Means That an Employer May Terminate an Employee for Good Reason, Bad Reason, or No Reason, as Long as the Reason is Not an Illegal Reason.

B. By Preserving Employment at Will, the Employer is Protecting Itself From Breach of Contract Claims by Current and Former Employees.

C. Employers Should Not Guarantee Employment to Anyone. (Employers Should Make No Promises to Any Employee Regarding Length of Employment or Grounds for Termination.)

D. Employee Handbooks (Exposure Risk in S. C. Unless the Employer Has Taken Advantage of the South Carolina Statute Regarding Signed Disclaimers and Employee Handbooks)

E. Most Dangerous Policies

1. *Disciplinary Action*
2. *Anti-Harassment**
3. *Important Notice/Disclaimer*
4. *Leave of Absence*
5. *Grievance Procedure/Process*
6. *Payments at the Time of Termination*

F. Oral Promises/Contracts

G. Disciplinary Action Forms

H. "At Will" Employment is a "Shield," Not a "Sword"

I. Contrasting "At Will" Employment and "Right to Work"

THE PROTECTED CLASSES

THE PROTECTED CLASSES

Anyone who interviews candidates for employment, who makes hiring decisions, or who is involved in disciplinary action or termination decisions needs to be keenly aware of the characteristics which are protected by the workplace discrimination laws:

race **gender** **religion** **national origin** **color**

age (40 and over)* **pregnancy** **veteran status*** **disability**

union membership* **off the job use of tobacco products (S.C.)***

morbid obesity **political affiliation (S.C. - with exceptions)***

that the individual previously complained or testified that the hiring employer discriminated against the individual;

that the individual previously complained or testified that the hiring employer violated occupational safety laws;*

that the individual previously complained or testified that the hiring employer violated the Fair Labor Standards Act;* and

that the individual previously filed a workers' comp claim against the hiring employer or testified against the employer in a workers' comp claim;*

Threshold Number of Employees Needed for Coverage Under <u>Almost</u> <u>All</u> of These Laws:

FIFTEEN (15)

“Legitimate, Non-Discriminatory Reason”

INVASION OF PRIVACY & DEFAMATION OF CHARACTER

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ATTORNEY - CLIENT PRIVILEGED

To: _____, Mayor
_____, Council Member
_____, Council Member
_____, Council Member
_____, Council Member
_____, Council Member
_____, Council Member

_____, City Administrator
_____, Personnel Director

_____, Esquire, City Attorney

From: Mike Malone

Date: March 13, 2001

Re: Legal Advice Regarding Privacy & Defamation of Character Issues

This memo is intended as a strong reminder to City Council Members and City supervisory officials regarding the sound practice of not discussing personnel matters with the media or anyone else who does not have a legitimate need to receive confidential personnel information.

As a strong general rule of thumb, the City treats all personnel matters as "confidential information." This means that personnel matters involving current or former City employees are not to be discussed with anyone except other Council members, senior City supervisory employees, and legal counsel. This advice is given to ensure that the City avoids creating legal exposure by commenting inappropriately or falsely regarding personnel matters. Importantly, this advice is also given to ensure that **individual** City Council members and the City's

supervisory officials, in their **personal** capacity, do not create legal exposure **for themselves** by commenting inappropriately or falsely regarding personnel matters.

If the media inquires about a current or former employee, the only appropriate comments are either "no comment" or "it would not be appropriate for me to comment about a personnel matter." If the City determines that a response to the media needs to be provided, then this response should be provided only with the assistance of legal counsel. I urge all City Council Members and City Officials to summon up all of the discipline at their command to avoid the inappropriate communication of confidential personnel matters. City Council members have a fiduciary responsibility to act in the City's best interests at all times. Avoiding inappropriate commentary about personnel matters is entirely consistent with the fiduciary responsibility of each member of Council.

Personnel matters should **never** be discussed in open session. Hence, if it becomes necessary to discuss a personnel matter, Council should always retreat to "executive session" before discussing the matter.

Council members should be aware that a "privilege" or "protection" attaches when personnel matters are discussed solely among persons who have a legitimate need to receive the information. The privilege or protection is "lost" if the personnel information is shared with an individual who does not have a legitimate need to receive the information.

In order for an individual to be able to state a plausible "defamation of character" claim, the following elements must be asserted: (1) a statement; (2) that is false; (3) that has been published or communicated to at least one other person (who does not have a legitimate need to receive the information); and (4) that causes damage to the subject's reputation.

Even if the commentary is true, the communication may give rise to a cause of action known as "invasion of privacy." Specifically, I am talking about what is known as the "public communication of otherwise private facts." Generally, what is needed here is a communication that has been "broadcast" to a number of people, that damages the individual's reputation, and that should have remained confidential.

By not commenting inappropriately, the City, City Council members, and City officials can avoid defamation of character and invasion of privacy claims.

The City's practices ought to be designed to **discourage** lawsuits and other types of formal legal claims. By not discussing personnel matters except with persons who have a legitimate need to receive the information, the City will be greatly reducing the threat of lawsuits.

City officials, of course, have an obligation to keep Council Members abreast of potential personnel related conflicts as well as formal personnel related conflicts that represent exposure to

the City. I routinely advise clients to take special precautions to ensure that confidential information is not inadvertently disclosed (or purposely disclosed) to persons who do not have a legitimate need to receive the information. One such precaution involves the dissemination of documents pertaining to threatened legal action. (These documents may be advice letters from me, letter from other lawyers threatening legal action against the City, or complaints from administrative agencies.) I advocate that such documents be numbered, handed out to Council members for review, and then collected after Council members have had an opportunity to review and/or discuss the documents. Council members who desire to further review the documents can come by to City Hall to do so. By preventing multiple copies of confidential documents from being in circulation, the City can greatly reduce its exposure to legal claims, and can avoid unnecessary public relations problems.

Council members should be aware that personnel matters, with a few very specific exceptions, are exempt from disclosure under South Carolina's Freedom of Information Act under the "unreasonable invasion of personal privacy" exception. My clients frequently receive FOIA requests for confidential personnel information. And my clients frequently respond to the requesting party that such information is exempt from disclosure. Please be aware that public bodies are <u>not</u> protected from legal claims when they respond to a FOIA request. Hence, employers that provide, in response to a FOIA request, information that includes false statements (or arguably false statements) or information of a private nature could be sued for defamation of character and invasion of privacy – and could lose.

Should you have any questions, please do not hesitate to contact me.

"DISCIPLINING WITH DIGNITY"

Disciplining With Dignity

1. ***Why Do We Discipline?***

   a. ***To Teach***
   b. ***To Modify Behavior***

2. ***The Two Categories of Conduct Which Lead To Discipline***

   a. ***Poor Performance***
   b. ***Misconduct***

3. ***Why Is it Important?***

   a. ***Respect for Human Dignity***

   b. ***Consistent w/ a Professional Work Environment***

   c. ***Maintaining/Increasing the Respect of Subordinates and Peers***

   d. ***Leading/Teaching by Example***

   e. ***Reduces Potential for On-Going Conflict***

   f. ***Limits Legal Exposure***

Some Dos and Don'ts

Never raise your voice

Focus on the conduct, not the person

Investigate before you discipline (Don't jump to conclusions)

Follow the "no surprise" rule when possible prior to administering serious discipline

Do not suggest that every facet of the employee's performance is unacceptable

Avoid the appearance of bullying the employee (six managers are not needed in the disciplinary meeting)

Always discuss performance problems in a private environment

Remember that discipline is designed to teach and modify behavior – not to humiliate

Have at least two (2) members of management in all disciplinary meetings

The "good cop/bad cop" strategy is not an effective approach. Management's position with regard to the appropriate disciplinary action needs to be communicated as though it is fully supported by the appropriate members of management

Give the employee an opportunity to respond to management's conclusions about the employee's performance and the appropriateness of the disciplinary action. Be prepared to advise the employee that management did not expect him to agree with management's assessment of the situation or the disciplinary action taken

Utilize early EAP intervention when appropriate. EAP referrals can often be communicated with a "because we care" message

In some instances, "memos to the file" are viewed by employees as less severe when compared to a "formal" disciplinary notice

Allow the employee to resign in lieu of termination if possible. (Note: For unemployment purposes, this will not operate to make the ex-employee ineligible for unemployment benefits. The termination will still be characterized as an involuntary termination.)

In special unsatisfactory performance discharge situations, permit the employee to continue working while he searches for another job. (It is generally accepted that an individual will have greater success in finding a job if he is currently employed.) This is possible only where there is no risk of sabotage

Do not clean out an individual's desk except in extraordinary circumstances

Permit the employee to return before or after normal business hours to clean out his desk unless doing so would pose a safety risk

TERMINATION OF AN "AT WILL" EMPLOYEE

TERMINATION OF AN "AT WILL" EMPLOYEE

A. General Points

1. **By definition, an "at will" employee can be terminated for good reason, bad reason, or no reason, as long as the reason is not an illegal one.**

2. **Employers need to remember: At will employment should be used as a "shield," not a "sword."**

3. **Employers need to exercise caution and restraint in exercising its legal authority to terminate employees at will. Employees should not be discarded like old pizza boxes.**

B. Communicating the Termination Decision is a Mission: Your Job is to Execute the Mission

Straight Talk About the Termination Meeting

(Presume that there are no legal impediments to following through with the termination decision.)

1. **You have completed the investigation and reached the decision to terminate an employee. What do you do now?**

2. **Advise the employee that you want to meet with him. Choose a private environment within which to communicate the termination decision.**

3. **Always have at least two appropriate members of management present. One member of management should do the talking. The role of the other member of management is to serve as an observer. (Often, one of the members of management is the Human Resources Representative. The HR Representative may be an observer, but may also serve as a "safety net" in the event the manager doing the talking begins to royally botch the termination meeting.)**

4. **Communicating the termination decision is a Mission! Execute the Mission! Get in, take care of business, and get out! The longer the meeting lasts, the greater the likelihood that you will screw something up!**

5. **I advise my clients to prepare a well crafted "Notice of Termination" document. I also advise my clients to have a competent labor and employment attorney (me – or someone like me) assist in the preparation of this document. If there is a legal challenge, this document will be Exhibit A. If this document is well written, in almost all cases there will be no legal challenge. The document needs to factually precise and should articulate a legitimate non-discriminatory reason. Special Note: This conflicts with the notion that an employee can be terminated for "no reason" and the notion that an employer does not have to give a reason when terminating an employee. This is a matter of philosophy. In my experience, which has been shaped by philosophy, I firmly believe that the best practice is to provide the reason/reasons for the termination decision. The level of detail is dependent upon the circumstances.**

   NEVER LIE ABOUT THE REASON FOR THE TERMINATION DECISION. (For instance, never tell the employee he is being "laid off" when the real reason is that his performance is deficient.)

6. **Once the participants in the termination meeting are seated, I recommend that the management official (who will do the talking) get straight to the point.**

   "Mr. Smith, the Company has made the decision to end its employment relationship with you effective immediately. Please take several minutes to review this document which explains the termination decision."

   (Allow the employee to completely read the termination document. If the employee attempts to begin protesting or discussing the termination document or decision prior to fully reading the document, direct the employee to fully read the document.)

   Once the employee has fully read the document, allow the employee the opportunity to respond to the termination decision. The employee may seize the opportunity to protest the termination decision or the Company's version of the facts underlying the termination decision. Allow the employee to vent. Be quiet. Let the employee talk.

   (For how long should the employer allow the employee to vent, protest, respond, etc.? A general rule of thumb is to allow the employee to continue until he starts repeating himself. An effective way to signal to the employee that he is repeating himself and that the employer is prepared to end the meeting is to ask the employee: Are there any points that you would like to make that you have not already made?)

After the employee has responded, what should the management official say? "Mr. Smith, this is not pleasant for me or (the other management official who is present). And we recognize that this situation is far more unpleasant for you. Please understand that we did not expect you to agree with the Company's assessment of your performance/your situation."

(The last statement signals to the employee that the employer is not going to change its mind and that the termination decision is final. It also signals the end of the discussion regarding the employment relationship.)

If the employee wants to argue with you about the decision, you might tell the employee," We have no desire to debate the Company's decision with you. That is not why we are meeting." (This sends a message to the employee that the Company has made up its mind and that attempts to persuade the Company to change its mind will be futile.)

C. The Option to Resign

7. **In almost every circumstance, I recommend that the Company permit the employee to resign in lieu of termination. Why? There are multiple reasons. First, it is a method of "cushioning" the employee's fall and it costs the employer nothing. How does this "cushion" a terminated employee's fall? Because the employee can truthfully tell prospective employers that he resigned. We want the terminated employee to land on his feet. If he is able to get on with his life, the chances that he will file a legal claim against the Company are greatly reduced. Second, it allows the employer to demonstrate some good faith and to show some kindness in a very unpleasant situation.**

8. **What about unemployment benefits? Many terminated employees will refuse to resign on the ground that the employer is simply trying to screw the employee out of unemployment benefits. If this happens, the employer needs to explain that for purposes of unemployment benefits, the termination will be considered "involuntary" and that a "forced resignation" does not disqualify an individual from receiving unemployment benefits. (The Company may want to point out, though, that if the individual files a claim for unemployment benefits, that the Company will likely contest the claim.)**

D. What About Severance Benefits?

9. **If the Company has no formal severance plan which promises severance pay, then providing a severance benefit is optional. I preach to my clients that they should always obtain a release in exchange for a severance payment. If the terminating employee is over 40 and the employer is subject to the Age Discrimination in Employment Act, then the release document needs to be in compliance with the Older Workers Benefit Protection Act.**

E. Personal Effects & Desk Cleaning Issues

10. **Employers should never humiliate an employee by having him clean out his desk in front of his co-workers. Unless there is a legitimate safety or security threat, allow the employee to come in outside of normal work hours to collect personal belongings.**

F. COBRA Notice & Election Forms

11. **Employers can either handle this in person or by mail. Regardless of how this is handled, employers need to recognize how extremely critical it is to ensure that employees have been provided with a COBRA Notice & Election Form**

G. Additional Employee Benefits Issues

12. **Employers should provide information regarding employee benefit programs in accordance with the "Plan Documents" that govern such plans.**

H. Collecting Employer Property & Final Paycheck Issues

13. **Employers should ask terminating employees to turn in all employer property at the earliest point possible. This necessarily includes keys, beepers, cell phones, uniforms, laptop computers, manuals, computer disks, inventory, etc. Many employers wind up violating the South Carolina Wage Payment Law and/or the federal Fair Labor Standards Act (minimum wage and overtime) by illegally withholding payment to a terminated employee who failed or refused to return Company property.**

    Employers are permitted to deduct the value of any Company property not returned from the terminated employee's final paycheck, provided that the employer has a policy explaining that the value of such property will be deducted from the employee's final paycheck. (Special Note: There is a provision in the State Department of Labor, Licensing, & Regulation's Enforcement Guidance materials that indicates that a legitimate debt can be "offset" by the employer, even if the employer has no policy explaining this practice. In my opinion, the safer and better practice is to explain this practice of deducting legitimate debts in a policy or to have the employee sign an acknowledgment form that debts to the employer and the value of any Company property provided to the employee will be deducted from the employee's final paycheck(s).

I. Neutral References

14. **It is generally a poor business decision to attempt to interfere with a terminated employee's efforts to transition into new employment.**

J. Confidential Information & Trade Secrets

15. **If the terminated employee has worked in a position that provided access to confidential information that, if disclosed, could damage the Company, the employer might consider providing the employee with a copy of the South Carolina Trade Secrets Act along with the Notice of Termination document. The employer would need to explain that the Trade Secrets Act prohibits the terminated employee from disclosing confidential information to any other party and that the Act provides for both criminal and civil penalties. Unless the employee has threatened to disclose confidential information, the employer would want to explain that a copy of the Act was being provided simply to make sure the employee was aware of the Act and that the employer is prepared to protect its interests if necessary.**

NOTES

SOCIAL MEDIA

SOCIAL MEDIA

"Social media" is understood to be content created by individuals or entities using accessible, expandable, and upgradable publishing technologies, through and on the internet, including internet forums, blogs, online profiles, wikis, podcasts, pictures, video, email, instant messaging, music sharing, and voice over IP.

Examples of social media sites include but are not limited to Facebook, MySpace, LinkedIn, Google+, blogs, online journals and diaries, discussion boards and chat rooms, Twitter, Tumblr, YouTube, RSS, Second Life, Delicious, Yahoo Groups, Wikipedia, Yelp, ZoomInfo, Wordpress, Flickr, Instagram, Clixtr, Pinterest, and many other applications and variations of applications that become available almost daily.

Comments" include but are not limited to information, articles, commentary, pictures, videos, images, or any other form of communicative content posted on any of the above type sites.

IMPORTANT CONCERNS FOR EMPLOYERS

1. Maintaining Professionalism;
2. Protecting Privacy and Confidentiality;
3. Emphasizing Personal Accountability;
4. Ensuring Respectful Content;
5. Requiring Accuracy and Transparency;
6. Prohibiting Offensive and Illegal Conduct; and
7. Complying With Applicable Laws.

IMPORTANT QUESTION: IS YOUR ORGANIZATION A "PRIVATE SECTOR" EMPLOYER OR A "PUBLIC SECTOR" EMPLOYER?

A. Private Sector Employer – National Labor Relations Act ("Protected Concerted Activity" Protection Applies)

B. Public Sector Employer – First Amendment to the U.S. Constitution (Speech About Matters of Public Concern is Protected Speech)

RECRUITING/HIRING/SCREENING: WHAT ARE THE RISKS?

(This is a "Pre-Employment" Issue)

A. Laws Implicated: Title VII of the Civil Rights Act of 1964, as amended: Americans With Disabilities Act (ADA); Age Discrimination in Employment Act (ADEA); Fair Credit Reporting Act.

B. Title VII/ADA/ADEA: These are "anti-discrimination" statutes. Employers that use electronic media to search for/screen candidates might discover that a candidate is in a protected class through an internet/social media search, when the employer, for sound legal reasons, would not seek this information through an application form. This can lead to allegations of discriminatory hiring.

C. Fair Credit Reporting Act: Background checks conducted by a third party implicate the Fair Credit Reporting Act which, in turn, requires notice from the employer and the candidate's consent. Thus, if the employer itself is conducting the search, then the Fair Credit Reporting Act is not implicated. However, if the employer engages or hires a third party to conduct the search, then the Fair Credit Reporting Act requirements must be met.

EMPLOYEE USE OF SOCIAL MEDIA

A. Inappropriate Disclosures: Trade Secrets & Other Confidential Information

B. Embarrassing Information/Negative Branding/Disparaging Competitors or Others

C. Defamatory Communications: False communication, Published to at Least One Third Party, and that Damages Another Person's or Entity's Reputation. ("Truth" is an absolute defense to a claim of defamation of character.)

D. Securities Laws for Publicly Traded Companies: Disclosure of Confidential Information

E. Workplace Harassment – Unwelcome Contact or Communications (Jokes, Videos, Articles, Social Invitations, etc.)

F. Federal Trade Commission – 2009 Endorsement Guideline Changes – Employees Commenting on Company Products Must Disclose Their Affiliation

DISCIPLINARY ACTION FOR SOCIAL MEDIA USE

A. Protected Concerted Activity (National Labor Relations Act): Comments About Wages, Hours, and Working Conditions on Behalf of at Least Two Employees

B. Discrimination: Unequal Enforcement of a Social Media Policy; Similarly Situated Employees With Different Legally Recognized Characteristics are Treated Differently

C. Retaliation: When Social Media Commentary Could be Construed as a Complaint, and Adverse Action is Taken Against the Employee Thereafter

D. Whistleblowing: (If a Whistleblower Law is Applicable)

BOTTOM LINE: IF YOUR ORGANIZATION IS PREPARING TO SUSPEND OR TERMINATE AND EMPLOYEE FOR INAPPROPRIATE SOCIAL MEDIA COMMUNICATIONS, CONTACT A COMPETENT EMPLOYMENT ATTORNEY BEFORE TAKING ANY ACTION

PRIVACY

A. Common Law Invasion of Privacy – Always Tied to the Employee's Expectation of Privacy: Employers Need to Go Out of Their Way to Communicate That Employee's Should Have No Expectation of Privacy Regarding Employer Equipment and Communication Systems

B. Stored Communications Act (Recent Case Found That "Non-Public" Facebook Posts are Covered by the SCA, but NOT Posts Produced By a Friend) (Electronic "Storage")

C. Federal Wiretap Law (Protection Against "Interception" – Not Usually Implicated by Common Social Media Usage)

SOCIAL MEDIA POLICIES

A. Have Your Organization's Social Media Policy Developed/Reviewed by a Competent Employment Attorney

B. See Attached Article