

LOMURRO, DAVISON, EASTMAN & MUÑOZ, P.A.

The Importance of Accurate Documentation in the Workplace

In the workplace environment today, upper level management often disregard the need for their supervisors and employees in Human Resources to accurately document their employees' performance and various other personnel issues. In other instances, employees with supervisory authority refrain from reporting incidences which they find to be trivial. Personnel files often lack accurate documentation because supervisory employees do not want to seem "overly critical" or end up in disfavor with their working peers. All of the above mentioned conduct is a disservice to the Company.

Typically, it is not until a supervisor would like to terminate an employee that the personnel file is reviewed, and although the behavior of the subject employee had been complained about and repeatedly discussed, to everyone's surprise the employee's personnel file is absent of any documentation of any problems. Suddenly, the Company is faced with two options: 1) deal with the "problem" employee or 2) terminate the employee and keep your fingers crossed there is no lawsuit.¹

A recent New Jersey Appellate Division case reiterated the importance of adequate documentation. In Anglin v. Prudential Investment Management, the plaintiff worked with her employer for over fifteen years. During her tenure with the Company she received promotions, however, Ms. Anglin began to exhibit performance and behavioral issues while working for a certain supervisor. For example, she requested leave to take vacation during the Company's busiest time and continuously complained once the leave request was denied. This behavior resulted in her receiving an overall favorable evaluation that year, however, she was rated as "not meeting expectations" in the category relative to team work and communication with supervisors. Thereafter, the plaintiff's unprofessional behavior continued, even after she was transferred to another supervisor.

In 2001, Ms. Anglin lodged an internal complaint against her new supervisor alleging that he sexually

harassed her. The Company conducted an investigation and could not substantiate her claims. After Ms. Anglin filed the complaint, her insubordinate conduct continued. Despite numerous efforts to resolve the situation by the employer, eventually Ms. Anglin was terminated for her pattern of insubordinate behavior and unsatisfactory job performance. Upset that her employment relationship was terminated, Ms. Anglin sued Prudential claiming, among other things, that she was terminated in retaliation for her sexual harassment complaint. Fortunately, Prudential maintained documentation regarding both Ms. Anglin's conduct and the Company's efforts to resolve the problem.

During the litigation process, Prudential filed a motion to dismiss producing evidence that the plaintiff was not fired because of the complaint, but rather she was fired due to her insubordinate and unprofessional behavior. The trial court was persuaded by Prudential's evidence and the case was dismissed. The Appellate Division affirmed the lower court's decision dismissing the plaintiff's Complaint.

This case highlights the benefits of accurate documentation in an employee's personnel file. Not only did the documentation protect the Company from liability, but it also saved the Company significant legal fees from having to take such a specious claim to trial. If your supervisors have not been educated in the necessity for such documentation, this should be done sooner rather than later to prevent your Company from having to deal with baseless claims and incurring unnecessary litigation costs.

1 - Although most employees are "at -will" and can be terminated at any time so long as their termination is not based on a discriminatory reason, New Jersey's anti-discrimination laws are so expansive that most of the population would be covered by one of the protected categories.

Misclassification of Employees as Independent Contractors May Mean Jail!

It is not an uncommon practice in the construction industry to classify workers as independent contractors even when those workers do not meet the qualifications to be classified as such. Notwithstanding, the classification has been assigned to workers as a cost saving device to avoid payroll contributions, employer related deductions for withholding tax and other amounts typically withheld by employers for employees. This practice led to the July 13, 2007 adoption of the Construction Industry Independent Contractor Act (N.J.S.A. 34:20-1 et. Seq.)

The Act is designed to establish Civil and Criminal penalties. The Act applies to employers of any kind that are *primarily engaged in making improvements to real property or entering into a contract for improvement to real property and the act also applies to any A subcontractor or lower tier contractor.* The reach of the Act extends from a prime contractor through the lowest levels of the construction contract chain.

Section 4 of the Act creates a presumption of employment for any individual who is paid for *services performed in the making of improvements to real property.* That person *shall* be deemed an employee unless it is shown to the satisfaction of the Department of Labor and Workforce Development that: The individual has been and will continue to be free from control or direction over the performance of service both under his contract of service and in fact; and (b) the service is either *outside the usual course of business ...or the service is provided outside of all of the places of business of the employer ...and* (c) the individual is customarily engaged in an independently established trade, occupation, profession or business. Furthermore, the Act mandates that the common practice of issuing a 1099 to employees or failing to withhold deductions from their pay *shall not* be considered when making a determination of the employment relationship.

If the employer fails to pay for a worker who should be classified an employee, *wages, benefits, taxes or other contributions* required by the prevailing Wage Act, the Unemployment Compensation Law, the Temporary Disability Benefits Law, the New Jersey Gross Income Tax Act, and the New Jersey State Wage and Hour Law that constitutes a crime.

The severity of the crime depends on the conduct of the employer. If it is a negligent failure to properly classify the employee, the employer is guilty of a disorderly persons offense, carrying with it a fine of not less than

\$100.00 nor more than \$1,000.00 and a possible period of imprisonment not less than ten (10) nor more than ninety (90) days. The Act further provides that during each week *any day of which any employee is misclassified* constitutes a separate offense. If the failure to properly classify the employee is done knowingly, the employer as well as any officer, agent, superintendent, foreman or employee of the employer who knowingly fails to classify an individual is guilty of a crime of the second, third or fourth degree depending on the size of the contract amount. In addition to any criminal penalties the Department of Labor and Workforce Development may impose a fine up to \$2,500.00 for a first offense and up to \$5,000.00 for each subsequent violation.

In addition to the penalties mentioned above, the Statute also permits debarment. That is the prohibition from contracting with any public body or for any public work project or for performing any work thereon for a period of three years. The penalty of debarment may be imposed if the Commissioner of Labor and Workforce Development determines *after investigation* that a knowing failure to properly classify has occurred or if there is a conviction of a knowing misclassification. Thus, even if a criminal proceeding is brought and an acquittal results, the three year debarment of the company may be imposed if the Commissioner, after an administrative investigation, determines that a knowing misclassification occurred.

In addition to debarment, the Commissioner, also after investigation, may immediately suspend the contractor's registration. The effected contractor may have a hearing on the issue with the right of appeal.

However, should a second or third violation occur the scope of the suspension increases. For a second violation, the Commissioner may also, in addition to spending the license, issue a stop work order ceasing all business operations at *every site at which the violation occurred.* For a third or subsequent offense, the Commissioner must issue a stop work order requiring *the cessation of all business operations of the violator.*

In addition to those penalties, the stop work order issued under the Act remains in effect against any successor (corporation or other business entity), that has one or more of the same principles or officers as the employer against whom the stop work order was issued. Thus the legislature has seen fit to impose continuing liability

Continued on next page

Missclassification continued . . .

despite a change in corporate form which would normally operate to cease such liability. In addition to a stop work order, the Commissioner may also assess a \$5,000.00 per day penalty for any business which conducts its operations in violation of the Stop Work Order.

The Act, in addition to all of the above remedies, provides to each employee who has been improperly classified the right to bring a civil action for damages resulting from the misclassification. The individual, his representative or a labor organization may also bring the action on behalf of the individual or as a class action. The Statute permits the Court to award attorneys' fees and other costs in successful action brought under this Act.

Finally, the Act provides that discrimination and retaliation by an employer for claims brought under this Act is prohibited. Furthermore, the Act prohibits retaliation against employee who makes a claim under the Act regardless of whether they prevail on the merits of their claim. The legislature, in seeking to protect the rights of employees, has also created a rebuttable presumption which states that adverse action against an employee within ninety (90) days of the person's *exercise of rights protected under this Act* gives rise to a rebuttable presumption of the action being taken in retaliation for exercising the rights under the Act.

The legislature has taken significant and far reaching steps in an attempt to prohibit employers from misclassifying their employees and thus depriving those employees of benefits. The Civil, Criminal and Debarment penalties as well as the successor liability illustrate the strength of this law and dire consequences of those who violate it.

Restrictive covenants must protect a legitimate business interest.

Recently the United States District Court for the District of New Jersey refused to enforce a restrictive covenant against soccer instructors. The Court agreed with the former employees (soccer instructors) that they did not possess any unique or extraordinary skills the deprivation of which would harm their former employer. The employees also argued that there was nothing confidential about how they teach soccer to children and pointed out that materials explaining the employer's alleged proprietary coaching program are advertised and available for purchase by anyone for a nominal fee. Similarly, the identity of the employer's clients was readily available over the internet. The Court found that the proprietary program was nothing more than a collection of practices obtained from other public sources and agreed that there was nothing confidential or extraordinary about teaching or managing these soccer camps.

Therefore, in order to have a restrictive covenant that is enforceable, you must be sure you have a legitimate business interest that can only be protected by tying down your employees. The information should not be readily obtainable by the public, *i.e.*, selling techniques to the public will hurt your own claim that you have a legitimate business interest to protect.

A New NJ Whistleblower Statute

On March 13, 2008 the New Jersey False Claims Act (NJFCA) took effect. The Act prohibits, amongst other things, a person from knowingly making a false statement to obtain payment of a fraudulent claim by the State.

The NJFCA falls for severe penalties for those found liable. The penalty includes a civil penalty equal to the penalty under the Federal False Claims Act (currently between \$5,000 and \$10,000) and also three times the amount of damages which the State sustains.

The Act also provides a way for whistleblowers to benefit from these penalties. Under the NJFCA, an individual may sue on behalf of the State and receive a portion of any recovery. These *qui tam* actions are filed under seal, and thereafter the Attorney General decides whether to join the case. **If Attorney General does not decide to take over the prosecution, the individual whistleblower will receive between fifteen (15) to twenty-five (25) percent of any judgment settlement. If the Attorney General does not proceed with an action, and the individual proceeds with the action, then the individual will receive between twenty (25) to thirty (30) percent of any judgment or settlement.** Additionally, if the individual is successful the court will award payment of the individual's reasonable attorney's fees.

Advice From a Debt Collector

As business owners, there undoubtedly will come a time when you are owed money from a customer or a client, who refuses to pay. Prevention is always the best way to avoid non-paying customers. The best thing to do, of course, is to get as much money up front as possible. It is imperative to have a signed contract from the person or persons you are providing goods and services. This, ultimately, makes it easier to collect the debt, especially if a lawsuit is required. If you are doing business with an individual, as well as a corporation, be sure to get both parties to sign the contract or if you are contracting with a corporation you may want to have the individual personally guarantee the corporation's debt. That way, if the corporation goes out of business, you can still proceed against the individual.

Charging interest is one way to get debtors to pay on time. Be sure to put the interest amount in the contract that the customer/client signs. This also applies to late fees.

Try to get as much information as possible about the assets of the company and/or individual. Getting this information up front is easier than getting it once the debtor stops paying, or a lawsuit has been filed. A business application requesting social security numbers, bank accounts, vehicles, etc. will aid in collection later on, if necessary.

If you have a customer or client that genuinely wants to pay, but is having financial difficulties, a payment arrangement may be worth considering. If you force a business or person to immediately pay in full, they may end up filing bankruptcy, leaving the possibility that the debt will not be paid at all.

It may be necessary to discontinue doing business with someone who is not paying as agreed. As a rule, outstanding debts should be monitored regularly so that a bill does not reach an astronomical figure prior to discontinuing business with the defaulting party.

Regular phone calls to slow payers may help. Just be sure not to exceed what is allowed by the Fair Debt Collection Practices Act. Harassing someone is in violation of the Act and may subject you to fines.

If the party is unhappy with any aspect of the work performed, thus the reason for not paying, it may be beneficial to the working relationship to grant a credit for any particular discrepancy. If all measures have been tried, yet you are still not able to collect the debt owed, you may consider hiring an attorney to assist you. Once a lawsuit is filed, some people will pay immediately. Otherwise, once there is a judgment against the debtor, there are several means by which a debt can be collected, i.e., wage executions, bank levies, levies upon the personal belongings of the debtor, etc. Judgments in New Jersey are good for 20 years, at which time they are renewable. The debtor will have difficulty buying or selling property with a judgment against them in the Superior Court.

So, although it is frustrating to do a job, or supply goods, and not be paid for it, being prepared and knowing who you are doing business with is your best bet for collecting the money due.

If you have any questions regarding enhancing your contracts to decrease your debt collection difficulties or just need help with a debt collection, please call **Simon Kaufman, Esq.**

Employment of Veterans

Did you know that the Uniform Services Employment and Re-employment Rights Act (USERRA) requires an employer to make reasonable efforts to help a veteran become qualified for a job, regardless of whether he suffers from a service disability. For instance, you may have to provide job training or re-training even if the veteran doesn't suffer from a disability. Moreover, you may have to accommodate disabilities related to military service even if they aren't covered by the Americans With Disabilities Act. If you attempt to hire a veteran with a disability related to his military service, you may under certain circumstances ask him to voluntarily self-identify whether he is a disabled veteran. The "certain circumstances" are only if your company has an affirmative action plan required by federal, state or local law that mandates affirmative action for disabled individuals and veterans or if you voluntarily use the information to assist individuals including those with military service related disabilities. If you ask an applicant to self-identify, you must provide written documentation that you will use the information in connection with your affirmative action program. The written documentation must also state that you are requesting the information on a voluntary basis and you will keep it confidential. In addition, you must affirm that the information will only be used in compliance with the ADA and the applicant who refuses to self-identify will not be subject to any adverse action.

Don't Drive a Drunk Horse While Smoking....

Anyone who has listened to the official radio station of New Jersey in the morning has heard the early morning DJ discuss many of the fatuous laws that abound in this state. Here are some municipal/traffic offenses you not know about.

1. You can be guilty of drunk driving without driving.
 - If you let your friend drive a car in your control because he has had less alcohol than you, and he is under the influence of alcohol, pot, or non-prescription drugs, etc., you are guilty of drunk driving. N.J.S.A. 39:4-50
2. You must wear a helmet when riding a bike if you are under the age of 17.
 - As of March 1, 2006, you have to wear a helmet when operating a bike, roller skates, or a skateboard and have to do this until you are 17 years old. N.J.S.A. 39:4-10.1
 - The current definition of "roller skates" is "a pair of devices worn on the feet with a set of wheels attached, regardless of the number or placement of those wheels, and used to glide or propel the user over the ground."
 - Therefore, it appears that the new shoes with the wheel in the back, are covered by this statute. (Ex. Heelys, ProNova, etc.)
3. It's an offense to flight the ashes from a cigarette out your window.
 - It is actually a fine of \$200 to \$1,000 for each offense. This includes cigarette, cigar, match, ashes, or any substance of thing likely to cause or fuel a fire. N.J.S.A. 39:4-64
 - Also, the driver is presumed to be the person responsible for any violation of the section.
4. You must travel less than 4 m.p.h. when driving across a sidewalk.
 - If you cross a sidewalk when leaving a parking lot, house, or other venue you must stop, yield to pedestrians, and cross the sidewalk at a speed not to exceed 4 m.p.h. N.J.S.A. 39:4-100
 - This includes riding a horse over 4 m.p.h. over the sidewalk.
5. You can not just stick the parking tickets in your glove compartment and forget about them.
 - The municipal judge can suspend your license (or issue a bench warrant.) N.J.S.A. 39:4-139.1
 - If he suspends your license and you drive, it is possible to receive a ticket for operating while suspended. You can be fined an additional \$500, and if you get into an accident while suspended or revoked, N.J.S.A. 39:3-40, and there is any bodily injury, no matter how minor, to any other person there is a mandatory minimum of 45 days in jail.
6. You can receive a ticket for having a license plate frame.
 - You cannot have a license plate frame that covers any part of any marking imprinted on the license plate, i.e. covering the words State of New Jersey, the state slogan, any imprint, basically any of the plate itself. N.J.S.A. 39:3-33
 - A lot of the car dealerships place their companies frames on purchaser's cars and are placing their customers at risk.
 - In addition, a violation of this section can occur if grease, dust, dirt, or blurring material covers any of the markings on the license plate.
7. You must give way to a passing vehicle and cannot increase the speed of your vehicle.
 - The driver of a vehicle on a highway, about to be overtaken and passed by another approaching vehicle from the rear, shall give way to the right in favor of the overtaking vehicle and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle. N.J.S.A. 39:4-87
8. Any horse pulling a sled or sleigh along the road must have a sufficient number of sleigh bells.
 - A horse must have a sufficient number of bells attached to the horse's harness to give warning of its approach. N.J.S.A. 39:4-15
9. You must park parallel to the edge of the roadway facing the direction of traffic.
 - You must be six inches from the edge of the roadway and facing the direction the traffic is headed. This can be changed by local ordinances so check with your town. N.J.S.A. 39:4-135
10. You must stop driving for a policeman that blows a whistle.
 - A driver shall, upon one blast of a police whistle given by a police officer with a hand raised, bring the vehicle to a full stop, and shall not proceed again until he receives signal to do so from officer.
 - Three or more blasts of the whistle means that there is an approaching fire engine or some other danger. N.J.S.A. 39:4-122

Companies with a hundred or more employees must comply with the Federal and State Worker Adjustment and Retraining Notification (WARN).

The WARN Act requires businesses with a hundred or more employees to provide at least sixty (60) days notice of plant closings or mass layoffs. New Jersey has its own version of the WARN Act called NJWARN which has these same sixty-day notice provision. N.J.S.A. 34:21-1 to 34:21-7.

The Future Protected Class: Genetic Information

The Genetic Information Non-discrimination Act (GINA) will prohibit discrimination by employers on the basis of genetic tests; specifically, you may not fire or refuse to hire or otherwise discriminate because of genetic information. The employment provisions are expected to take effect in November of 2009. Employers that have genetic information on employees will be required to keep it in a separate file and treat it as confidential medical records.

The National Defense Authorization Act of 2008 amends the Family and Medical Leave Act of 1993.

The Act requires employers with more than fifty (50)

employees to provide up to twenty-six (26) weeks of unpaid leave to eligible employees to care for a family member injured in the line of active military duty.

Additionally, the Act requires employers to provide eligible employees with up to twelve (12) weeks of unpaid leave for exigencies involving the employee's spouse, son, daughter or parent on active duty.

As a result, employers should be sure to review and update their policies to ensure the language regarding the new categories covered FMLA are publicized.

\$10 million judgment in punitive damages in an age discrimination case.

In June of 2008, a Morris County jury returned a \$10 million punitive damage verdict in an age discrimination case against Avaya, Inc. The verdict came a day after the jury awarded \$743,000.00 in compensatory damages. The \$743,000.00 award was broken down as follows: \$325,500.00 in back pay; \$167,500.00 in front pay; \$250,000.00 in emotional distress. (The plaintiff was earning approximately \$87,000.00 a year when he was fired). Still to be added to those numbers are the legal fees which are in the *seven figure realm* (after nearly four years of litigation). (As a side note, Avaya offered \$80,000.00 to settle before trial).

We Are Pleased To Announce:

Douglas Katich has joined the firm. Mr. Katich is Chairman of the firm's Intellectual Property Protection team. He has a litigation practice which includes matters of business tort, unfair competition, patent, trademark, copyright, and trade secret cases as well as areas of complex commercial litigation. Mr. Katich prosecutes U.S. federal trademarks and negotiates and drafts complex license agreements for a wide range of technologies, application service providers, software vendors, and website companies as well as the entertainment industry. He is a frequent lecturer on topics related to intellectual property licensing and litigation.

Mr. Katich received his Bachelor of Arts in History from DePauw University and his Juris Doctorate from Valparaiso University School of Law.

and

James A. Paone, II has been designated by the Supreme Court of New Jersey as a Certified Civil Trial Attorney. This certification is granted to attorneys who demonstrate sufficient levels of experience, education, knowledge and skill in civil trial practice.

LOMURRO, DAVISON, EASTMAN & MUÑOZ, P.A.

ATTORNEYS AT LAW

Monmouth Executive Center
100 Willowbrook Road, Building 1
Freehold, New Jersey 07728-2879
(732) 462-7170 • Telefax (732) 462-8955
WWW.LOMURROLAW.COM

DONALD M. LOMURRO ○ †
DUANE O. DAVISON
EDWARD C. EASTMAN, JR. †
ROBERT F. MUÑOZ
ROBERT L. HEUGLE, JR. †
JAMES M. MCGOVERN, JR.
PETER H. LEDERMAN
BETTINA E. MUNSON ❖
JAMES A. PAONE, II †
THOMAS M. COMER †
ROBERT S. BONNEY, JR. ○
ANDREA WHITE O'BRIEN ❖

JOHN L. KRAFT
GARY P. MCLEAN
MICHAEL J. FASANO
SIMON L. KAUFMAN
ALTON D. KENNEY
PETER V. KOENIG
H. FRANK CARPENTIER
HEIDI HOFFMAN-SHALLOO
TRACY A. ARMSTRONG
LOREN ROSENBERG LIGHTMAN
DANIEL M. SANTARSIERO †
CARRIE A. LUMI

JAIME R. ACKERMAN
JONATHAN H. LOMURRO
ALLISON C. WILLIAMS
CHRISTINA D. HARDMAN
DOUGLAS KATICH
ANDREW T. McDONALD
MICHELE CRUPI
AMY L. MILLER
BLAKE R. LAURENCE
PERIANGILLY BELTRÉ
LORYN M. LAWSON
JOSEPH M. CLAYTON, JR.

STEPHEN C. CARTON
MICHAEL D. SCHOTTLAND †
JULES S. LITTMAN
JOHN KAYE
PHILIP G. AUERBACH †

Certified by the
Supreme Court of N.J. as a:
† Civil Trial Attorney
○ Criminal Trial Attorney
❖ Matrimonial Law Attorney

The principals in the firm have roots in the Monmouth, Ocean, and Middlesex County area for over 30 years. With a total staff of over 35 attorneys, 10 paralegals and more than 50 support specialists, our clients are assured of expertise in all of the varied and complex aspects of the law, and of the highest level of personalized service and attention to detail.

Corporate / Business Services:

We provide services in areas of:

Business Formation, Shareholder Agreements, Disputes, Business Finance, Commercial Real Estate (Acquisition, Sales and Leasing), Construction Litigation, Commercial Law and Litigation, Intellectual Property Protection, Tax Issues, Business Succession Planning, Internal Investigations, White Collar Defense, Tort Litigation Defense and Employment Law, Bond Law, Municipal Finance Law.

Individual Legal Services:

Our firm also offers representation in the following areas:

Personal Injury, Criminal Law, DWI Defense, Family Law (including mediation and divorce), Wills/ Estate Planning and Administration, Municipal Law, Real Estate, Title Litigation, Community Association Law and Municipal Court.

For more information about our services, review our Areas of Practice and Attorney Profiles pages on our website.

www.lomurrowlaw.com

LOMURRO, DAVISON, EASTMAN & MUÑOZ, P.A.
ATTORNEYS AT LAW

Monmouth Executive Center
100 Willowbrook Road, Building 1
Freehold, New Jersey 07728-2879
(732) 462-7170 • Telefax (732) 462-8955
WWW.LOMURROLAW.COM