



## **2014 CLM Annual Conference**

**April 9, 2014 – April 11, 2014**

**Boca Raton Resort  
501 E. Camino Real  
Boca Raton, FL 33432**

### **Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)**

#### **“How well do you know your employees?: Investigation of Employee Dishonesty Claims while avoiding Employer Liability”**

Employment dishonesty, fraud and theft claims are in the news all too often. Whether it is a simple theft from a cash register or a more complex fraudulent scheme it is important to perform a proper investigation that obtains results. Often this investigation will include the employer’s personnel and may even include co-workers, outside vendors and customers, dependent upon the type of claim. Once the claim is submitted and the investigation begins the information gathering is rapid and unrelenting. Move fast before it is gone. However, as will be discussed in the program it is important that unintended consequences are taken into consideration and avoided if at all possible.

#### **Setting the Stage of an Employee Dishonesty Claim**

There is no real run of the mill employee dishonesty claim since each one is fact specific. However, for discussion there are certain factors, and facts that are common. There is an employee or group of employees that have allegedly been involved in some action that resulted in a loss to a company for employer. This may be a financial loss or the loss of information, customer information or data.

Taking into consideration the average situation below

Money has gone missing from the register and it first becomes known after a few weeks once an audit occurs. Now the investigation begins internally to determine what if anything has gone missing and who may be involved. The insurance carrier is notified of the loss and they begin their own investigation. First, everyone wants to know who was involved in these actions. Then the focus is on recovery and prevention. The investigation into who stole the money turns to surveillance, if any exists, employee rosters, time sheets and interviews. Once the potential employees are identified perhaps social media is used to see if there is anything that could tie them into the loss or perhaps comments they may have made about “coming into money”. In the process of reviewing the Social Media sites it is discovered that one of the employees is surprisingly older than he looks. One employee has a previously undisclosed disability related to a mental illness, and another employee is discovered to have another carrier that

involves cross-dressing. The investigator is sharing all of this information with the employer and human resources during weekly meetings. It is determined that the loss occurred as a result of the first employee who was older than he looked. The other two employees are free of fault. However, the information obtained is now known to the employer. How this information is used or not used can give rise to potential future liabilities related to ADAAA or Sex discrimination claims.

It is important to make sure that only required personnel are involved in the investigation and handling of the claims. Sharing information to non-essential personnel could result in unintended consequences and once the information is out there is no telling how it is going to be used or who will end up with the information. A year later if the employee that was involved in the investigation is let go for some reason they may contend it is related to the information obtained. This is why it is imperative that the source of the information is documented as well as who is given the information.

### **The Real World of Field Investigation**

The real world of investigations is often different than the ideal world that attorneys and employment practitioners wish we could operate. Selection of the investigator is the first step to making sure that there is a good investigation performed from a legal perspective. This is important because to begin with it is important that the investigation is handled properly to prevent privacy or other concerns that could jeopardize the investigation and its results. You have to make sure that proper training is provided for the investigators and if employer personnel are involved that proper precautions are employed to prevent the dissemination of information that would otherwise be protected.

From the employment practitioners point of view it is important that all employees while not always treated the same, but is treated fairly and not differently as the result of a protected class or condition such as race, sex, religion, national origin, or disability. Many Human Resource professionals take care to avoid any knowledge that is obtained outside of the controlled interview process of information that can easily be obtained from daily interactions with an employee. It is difficult to un-ring the bell and the information if obtained will always be in the back of their mind. Even if it is never used, the mere fact that it is obtained and disclosed can lead to a presumption that the information was used and can require additional work or even present additional liability on the part of the employer.

### **Sometimes You get Information You were not Looking For**

When looking at employee dishonesty claims or theft claims you must look to two areas of authority. Pay attention to the policy under which benefits are being sought and authorization for the investigation as well as Federal and State laws that deal with employment discrimination. The investigator may not be versed in the employment laws, but through discussion with the employer and decision making personnel it should be explained what issues may arise and what information is fair game.

For the investigation It is important to ask questions and be curious. It is also important to investigate the claims and make sure that the theft are not the result of charges that are then reversed and part of a scheme involving customers or outside individuals. If the charges are legitimate then the customer will have likely have no problem with the questions being asked. It will be easy for them to support the charges and the claims that are being made and they will have no problem. Honesty is easy to back up. Dishonesty takes some work.

Communication is also a good way to avoid issues and to pinpoint issues before they get too bad. Consider early education and letting agents and investigators know what the expectations are either through correspondence, handouts and policies. If information is obtained how will it be handled? Who is entitled to the information and how is it documented as being obtained and disseminated.

When dealing with a disability claim for instance, lack of knowledge of a disability is a great defense. If an employer does not know that someone has a mental illness, asthma, or kidney disease, then it is difficult to legitimately maintain an action for discrimination. However, once the information is obtained, they then must deal with how the information is used and will be deemed to at least have knowledge of the disability.

If they just have knowledge do nothing with the information and make no changes to the persons work schedule, pay, job duties etc. then there is no issue. Once something occurs then be prepared to go into defensive mode. Even if the actions taken are well meaning such as making a job easier or adjusting job duties to accommodate an individual when no accommodation was requested can give rise to perceived disability discrimination. Essentially the person may not consider themselves disabled or having any limiting condition, but since the employer did they become protected.

In order to avoid the damage employers are cautioned to know the sources of the information they receive. The reason for the source is important but will not insulate an employer from liability. It is best to be upfront with investigators on the proper use of investigative techniques and what information is needed to be shared. If the reason for the investigation involves theft or dishonesty claims, then only that information should be shared. A full bio description to Human Resources or an employee's manager can do more harm than good. If the information is relevant and related then try and set up a process and protection so the decision makers about employment are protected from unnecessary information. Have investigators speak with investigators, rather than Human Resources. Keep information separated from the employees file so that some manager will not inadvertently come across some information about an employee when in the file. Following the companies policies and procedures consistently will also help establish the actions taken by the employer are legitimate and non-discriminatory. Be consistent in the application of the policies.

## **Conclusion**

Avoidance of issues is always the best way to avoid litigation. Where it cannot be avoided then look to preventative measures that can isolate information from decision makers when it comes to employment decisions. Document the source and what happened with the information. Simple steps can give your employment counsel a step up in defending a claim for discrimination, and can still allow a thorough investigation to catch and eliminate employee dishonesty claims.