

**Philadelphia Bar Association Small Business Committee CLE  
2011-7283**

*Philadelphia Presentation Only  
Mon., Dec. 12, 2011*

Handout:

## **Top 5 H.R./Employment Issues for Small Businesses**

Submitted By:

**Stephanie J. Mensing, Esquire**

Mensing Law, LLC

Philadelphia

---

# Biography

---

## FEATURED SPEAKER:

### **Stephanie J. Mensing, Esquire**

Ms. Mensing is the founder of Mensing Law LLC. She represents businesses and individuals in the state and federal courts of Pennsylvania and New Jersey in the areas of employment, business, and entertainment law and has lectured in these areas to both attorneys and students. In 2009, *The Legal Intelligencer* and *Pennsylvania Law Weekly* recognized Ms. Mensing as one of thirty Pennsylvania “Lawyers on the Fast Track.” The annual award recognizes Pennsylvania’s top up-and-coming lawyers under 40. In 2010, Ms. Mensing was selected as Pennsylvania Rising Star. Ms. Mensing is an active member of the Young Lawyers Division of the Philadelphia Bar Association. Since 2006, she has been a member of the Executive Committee of the Young Lawyers Division, serving as Financial Secretary in 2008 and as Secretary in 2009, and is also active with both the Labor and Employment Law and Federal Courts Committees. She also serves on the Board of Directors of the Digital Stone Project and volunteers with both the Philadelphia Volunteer Lawyers for the Arts and the New Jersey Volunteer Lawyers for the Arts. Ms. Mensing is admitted to practice in the Commonwealth of Pennsylvania, the State of New Jersey, the United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, and the United States District Court for the District of New Jersey. She graduated from Valdosta State University in 1998 with a B.A., *cum laude*, in History, and earned her J.D. in 2001 from Stetson University College of Law.

# Top 5 HR/Employment Issues For Small Businesses

Stephanie J. Mensing

Mensing Law<sup>LLC</sup>  
[www.mensinglaw.com](http://www.mensinglaw.com)



# #1 Hiring Qualified Employees



Mensing Law<sup>LLC</sup>  
[www.mensinglaw.com](http://www.mensinglaw.com)

- ✓ Job Descriptions
- ✓ Qualifications
- ✓ Advertisements
- ✓ Interviews
- ✓ E-Verification
- ✓ Testing

**Job Descriptions** clearly and adequately identify:

- the job's titles, responsibilities, required qualifications, and physical requirements (if any)
- relationship to other positions (including to whom the employee reports)
- salary range and benefit information
- any other essential information (for example, location if the employer has numerous locations)

When setting a position's **Qualifications**, it is important to state the position's actual qualifications, including:

- education
- experience
- communication skills
- technical/computer skills
- leadership skills
- physical requirements



The goal in placing an **Advertisement** is to attract qualified candidates.

- ads should include accurate information about the job's responsibilities and qualifications
- include information about the employer, detailed information about the position and its requirements, a salary range, identify benefits, and include information about relocation costs (if any)
- avoid words or terms that could result in litigation
- be careful not to rule out protected classes

The goal when conducting an **Interview** is to identify a qualified candidate (and to avoid legal pitfalls!)

- interviewer should be properly trained and understand the legal issues concerned with hiring employees
- focus on the position's requirements and job duties
- do not misrepresent (either intentionally or unintentionally) the company's situation or the position's future potential
- avoid telling a candidate that he/she is "right" or "sounds great" for the position

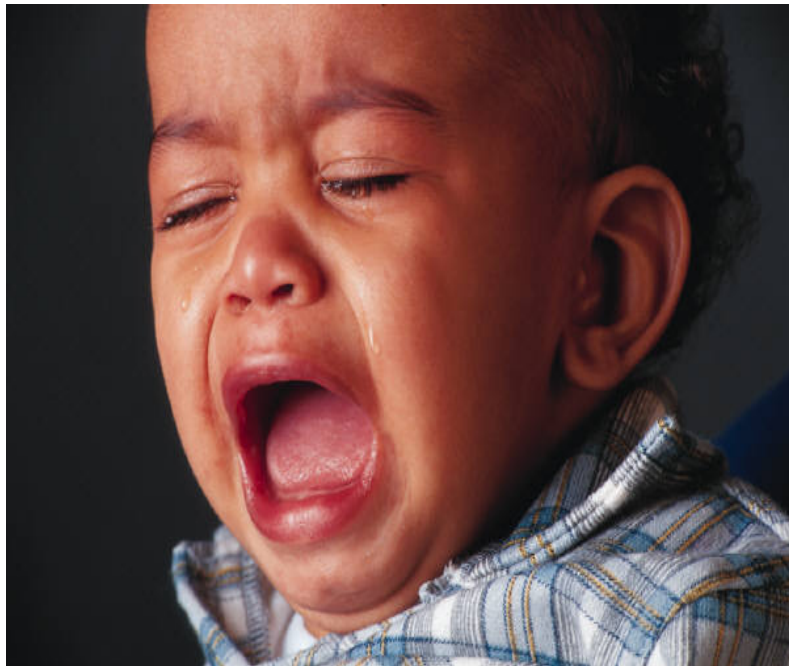
## eVerification

- once an employer identifies a qualified candidate, it should confirm that the candidate is authorized to work in the United States
- since November 1986, employers have relied on Form I-9 to confirm a new hire's eligibility to work in the United States
- the Department of Homeland Security offers a free eVerify program to assist employers in determining if an employee is eligible to work in the United States
- some states require eVerification

Pre-employment **Testing** can be effective in helping an employer to identify qualified candidates.

- employers should limit testing and ensure that all testing directly relates to the job
- employers should ensure the test directly relates to the position's requirements and that the test is non-discriminatory
- if a particular group (protected class) is being excluded based on the testing, the employer should explore other procedures for identifying qualified candidates

# #2 FMLA Leave



The **Family and Medical Leave Act** (“FMLA”) requires employers who employ 50 or more employees to grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee
- for placement with the employee of a son or daughter for adoption or foster care
- to care for an immediate family member (spouse, child, or parent) with a serious health condition
- to take medical leave when the employee is unable to work because of a serious health condition

An employee is eligible for FMLA if the employee has:

- worked for that employer for at least 12 months; *and*
- worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; *and*
- works at a location where at least 50 employees are employed at the location or within 75 miles of the location

## Medical Certification:

- an employer may require certification issued by a health care provider
- the employer must allow the employee at least 15 calendar days to obtain the medical certification



## Return from FMLA leave:

- upon return from FMLA leave, an employee must be restored to his or her original job, or to an “equivalent” job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.
- an employer cannot discriminate/retaliate against an employee for taking FMLA leave
- an employee’s use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using (but not necessarily during) FMLA leave

## Advice for employers:

- do not ignore employee statements about medical condition; gather enough information to determine if the absence qualifies for FMLA
- notify HR (or other person who coordinates leave); provide timely written FMLA notice to employees
- do not wait for a bad employee to go out on FMLA before documenting and/or taking action for poor performance or behavior
- what if the employer discovers poor performance or behavior while an employee is out on FMLA leave? Adams v. Fayette Home Care and Hospice

# #3 Misclassifying Employees



The **Fair Labor Standards Act** ("FLSA") establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.

- challenge for employers is correctly classifying employees

- some employers intentionally misclassify employees as exempt from overtime

## Exempt vs. Non-exempt

**Exempt employees** (a) must be paid a salary of at least \$455/week and (b) must meet the duties test for executive, administrative, professional, computer or outside sales definitions

- executive, professional, and administrative employees are exempt

- certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft sales-workers; or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers

## Exempt employees continued

- employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plan
- announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations
- domestic service workers living in the employer's residence
- employees of motion picture theaters
- farm workers

## Exempt employees continued

- employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plan
- announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations
- domestic service workers living in the employer's residence
- employees of motion picture theaters
- farm workers

**Non-exempt employees** must be paid for hours worked in excess of 40 in a week

- employers can pay non-exempt employees on a salary or hourly basis
- employee's job duties – not job title – determine if the employee is exempt
- employers cannot avoid paying overtime by paying the employee a salary



## Advice for employers:

- ensure salaried exempt employees qualify for exemption
- ensure non-exempt employees are being paid overtime for hours worked in excess of 40 in a week
- ensure non-exempt employees are accurately recording all hours worked
- are non-exempt employees working during lunch?
- do not treat exempt employees like non-exempt employees (can jeopardize classification)

## Independent Contractor vs. Employee

- employers sometimes misclassify employees as independent contractors to avoid paying taxes, unemployment, workers compensation, etc.
- title does not determine whether individual is independent contractor; degree of independence and control important in determining who is an independent contractor
- Pennsylvania's Construction Workplace Misclassification Act imposes strict standards for independent contractors in the construction industry

# #4 Documentation



Mensing Law<sup>LLC</sup>

[www.mensinglaw.com](http://www.mensinglaw.com)

Documentation is key in limiting exposure to workplace litigation. Employers should document all employment decisions:

- oral warnings, counseling, and other disciplinary actions
- decisions regarding salary, promotion, demotion, and transfers
- employee complaints regarding other employees
- conduct and document regular performance evaluations

Documentation should always:

- occur as close to the incident as possible so as to ensure the individuals involved are able to accurately document the incident
- show that the employer had a legitimate, non-discriminatory business reason for an adverse action it may take as a result of employee discipline
- put the employee on notice of any performance or disciplinary issues and give the employee an opportunity to correct his/her performance or avoid future policy violations

## Advice for employers:

- be consistent
- document all employees, not just a few
- use objective criteria
- support observations with facts
- remember that others will read your words

# #5 Exposure to Workplace Litigation



Mensing Law<sup>LLC</sup>  
[www.mensinglaw.com](http://www.mensinglaw.com)

In 2010, there were 99,922 charges of discrimination filed with the EEOC. Race and retaliation are the first and second most prevalent charges filed.

(<http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>)



## Strategies to avoid discrimination and retaliation claims:

- be proactive
- communicate
- stay organized
- tell the truth

## **Be proactive!**

- regularly review employment policies, make sure you have policies prohibiting harassment and discrimination, and ensure that all employees receive (and acknowledge receipt of) all updated policies
- to avoid inconsistent management decisions, make sure managers have their own procedure manual instructing them on handling employee issues
- regularly remind employees of the employer's EEO and anti-retaliation policies and require management to complete training

- respond promptly to every employee complaint of harassment; thoroughly investigate all complaints
- to help prevent the possibility of a retaliation allegation, remove the alleged harasser from the complaining employee's work area
- to help prevent the possibility of a retaliation allegation, oversee future employment decisions regarding the complaining employee
- issue appropriate discipline to the harasser; here again, be consistent in issuing discipline

- if appropriate, make the complaining employee whole (lost wages, etc.)
- when conducting business with third parties who will have contact with employees, the employer should prohibit harassment of its employees by the third party's employees (make it a contractual requirement)

## **Communicate!**

- regular communication between management and HR is essential in avoiding inconsistent application of company policies and shoddy record keeping
- HR/legal counsel's involvement in employment decisions will help avoid a manager affected by emotions from making adverse employment decisions

## Consistency!

- ensure that managers consistently enforce all employment policies (do not play favorites; do not pick and choose which policies to enforce)
- ensure that decisions regarding salary, etc. are consistent
- conduct regular performance evaluations for all employees

## Stay Organized!

- document every disciplinary action and make sure HR receives a copy of the discipline
- have employees sign performance evaluations, disciplinary actions, etc.
- file all documents in employees' personnel files

## **Tell the Truth!**

- when terminating an employee, tell the truth
- being honest about an employee's performance throughout the course of the employee's employment is also important



## Contact Information:

Stephanie J. Mensing  
Mensing Law LLC  
1616 Walnut Street, Suite 710  
Philadelphia, PA 19103  
215.586.3751 / [stephanie@mensinglaw.com](mailto:stephanie@mensinglaw.com)

