



NO. 61 — October, 2004

DO YOUR EMPLOYEES OWE YOU ANY DUTIES?

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The duties employers owe to their employees get a great deal of attention in the media, both “mainstream” and “alternative.” As an employer, you hear, almost every day, about new court rulings against employers on overtime payments, harassment, disability accommodation, religious discrimination and dozens of other areas. Legislators, local, state and federal, regularly “improve” upon those duties. Wrongful discharge and whistleblower claims continue unabated, often based on the flimsiest of alleged “promises” to or complaints by the employee. The “typical” employment-related lawsuit which results in a plaintiff’s jury award costs an employer between \$300,000-\$500,000 in damages, not including the employer’s own defense cost. Many employers may wonder if there are any reciprocal duties or responsibilities which employees owe to the employer.

The good news is that the law continues to recognize (and even to expand in certain areas) a number of significant duties which are owed to the employer by the employee. Further good news is that employers who are careful in their planning can reinforce, supplement, implement and enforce those duties in significant ways. The following list of duties which are either owed to the employer as a matter of legal right, or can be created with employees by appropriate notice, contract, or other planning on the part of the employer, should serve as a very useful checklist for employers who want to review their employment related “risk management” planning and believe that “the best defense is a good offense.”

1. The Duty of Loyalty. Employees are legally obligated to serve the interests of their employer, rather than their own interest or that of third parties. This means that personal use of the employer’s facilities, supplies or equipment, or of paid time, is not permissible and that theft, self-dealing and usurpation of business opportunities of the employer are prohibited.

2. Honesty is a Required Policy. An employer is entitled to his or her employee’s full honesty in written and verbal communications, commencing with applications, resumes and interview information including full candor in all responses as to employer inquiries about employee conduct and performance, the reasons and background related to employee injuries and illness, particularly where related to issues of leave, job accommodation and employer paid benefits and all other relevant matters. Both affirmative misrepresentations and material omissions can represent violations.

3. Productivity/Profit Contribution. Employees’ job descriptions and compensation plans, as well as disciplinary systems, can be designed to ensure that the employer receives an honest and profit-producing “day’s work” in return for employment. If you fail to structure positions appropriately, you may find yourself required under the ADA or other law to retain employees who are contributing little or nothing to the bottom line.

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4. Post-Employment Duties to the Employer. Through careful planning before employment commences, the employer can create post-employment duties which lawfully restrict the key employees' ability to compete with the employer or to solicit the customers or employees of the employer after separation. Such restrictive covenants must be drafted and implemented strictly in compliance with complicated legal principles, and should not be attempted by non-lawyer employer managers.

5. Confidentiality Protections. Employers, again with careful planning, can provide for protection of their trade secrets and other critical business-related information, even if these do not amount to trade secrets. These restrictions can be implemented for all employees, but cannot be established "after the fact".

6. The Duty to Comply With the Employer's Own Rules. An employer can create and implement policies and procedures which employees may be expressly required to observe. In this area, as well as many others, there are legal requirements which must be observed, but all legitimate employer objectives can be served with carefully drafted rules, prepared with advice of counsel.

7. The Duty to be Present Rather Than Absent. Employers are suffering an epidemic of absences from employment and a very difficult "mine field" to negotiate in responding to those absences, given the protections of the FMLA and the ADA. Suffice it to say that you can, again through policies, job descriptions and careful performance and disciplinary responses, manage absenteeism problems, but it takes far more planning and legal understanding than the administration of absence policies used to require. However, even though use of sick days can now turn into something of a "federal case" under the FMLA, employers should know that it is quite possible to draft a comprehensive policy that both complies with the law and manages your absenteeism problems, with a view toward the bottom line and fairness to other employees.

8. Last Chance Situations. The employer can create an absolute duty of compliance with specific written directions provided in a last chance warning, if these documents are prepared carefully and implemented after appropriate prior discipline. Such warnings can make a dreaded termination situation far more easy to manage, in many cases converting terminations into resignations or "self-activated" terminations.

9. Duties Relating to Moonlighting and Unavailability for Work. Many employers experience problems with employees' second (or even third) jobs or lack of availability for work due to other non-remunerative commitments or activities. Though employees' off-duty activities should be regulated with care, an employer can create legally-enforceable duties of notice to the employer and "coordination" when other activities may interfere with employment.

10. The Duty to Assign or Share Inventions or Copyrights. As with post-employment commitments relating to competition and solicitation, the enforcing of employer rights to ownership or participation in employee's inventions or copyrights must be carefully and lawfully prepared before the fact and are limited, by law, to certain types of employment-related inventions, developments and copyrights. These issues can be "big ticket" and should be planned for at the inception of employment.

11. The Duty to Reimburse and/or to Permit Payroll Deductions. Employers are often "stuck" with bad debts, unearned commissions and advances or the cost of theft, carelessness, or even intentional sabotage on the part of employees. There is no "magic bullet" for dealing with these issues, but employers can provide for acknowledgement of debts and authorization of payroll deductions or other forms of reimbursement in connection with employees' responsibility for many debts and costs to the employer. As with most of the duties owed to employers, prior employer action to reinforce and define the obligation is critical.

12. Other Duties Pertinent to Particular Employers. The above list is not an exclusive one. Employers in different industries may have different concerns and the facts and circumstances of some employee situations may create special duties to the employer which demand special attention. Any obligation which you believe has been or should be created on the part of your employees can be addressed with appropriate and legally-sufficient documentation through employment applications, statements of hire or employment agreements and through policy and procedural materials and handbooks, or otherwise. To the extent you have any hypothetical concern in connection with your employees ("what if _____?"), planning with experienced labor and employment law counsel will be cost-effective to assure that you can count on employees knowing and doing their duty, or of obtaining a remedy if they do not.

Although employers do not hear much in the popular press about the duties owed to the employer by the employee, the law does recognize and enforce those duties, particularly where the employer has taken affirmative action to specify and implement them with irrefutable documentation. If your organization has not reviewed and improved its employment-related policies and materials in the last two years, that time would be well-spent. Such an effort both documents your compliance with the duties imposed on you as an employer by Congress, the Legislature and the courts, and provides you with the ability to define and require compliance with duties owed to the employer by your employees.

Are Your Employee Handbook And Employment Documents Protecting Your Firm Or Putting You At Risk?

If your Company's employee policy handbook, hiring and discipline materials, drug and alcohol testing policies, or other critical labor or employment documents or policies are more than 2 years old (or non-existent), your firm is at risk. Call (952-896-1700) or fax (952-896-1704) us if you are interested in a complimentary review of your materials and information on our cost-effective "fixed fee" program to customize and update these materials for your firm. The cost is \$775.00 for handbook and employment materials (with 2 hours customizing time included) and \$375.00 for drug and alcohol testing policy and materials (with 1 hour customizing time included).

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UPCOMING SEMINARS

We are now accepting reservations for two upcoming Breakfast Briefings listed below. For more information or to register, see the attached Reservation Forms for both of our fall seminars or visit our website at www.seatonlaw.com:

Effective Employee Performance Review and Discipline: Practical Steps to Better Manage Employee Performance, Improve Profits and Reduce Litigation Risk

October 28, 2004

7:30 Registration & Continental Breakfast

8:00—9:30 Program & Questions

Presenter: Attorney Douglas P. Seaton

Cost: \$20 per person, payable at the door

Program Location: PROSOURCE Classroom

First Floor, 7300 Metro Blvd, Edina, MN 55439

In Search of the Missing Workforce—Managing Workplace Absences

November 18, 2004

7:30 Registration & Continental Breakfast

8:00—9:30 Program & Questions

Presenters: Attorneys John Bowen & Tom Revnew

Cost: \$20 per person, payable at the door

**Program Location: PRIME Hotel
(formerly Wyndham Hotel)**

4460 W. 78th Street Circle , Bloomington, MN

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