

Legal motion



ARE YOU DOING WHAT IT TAKES TO AVOID COSTLY LITIGATION?

BY DENNIS SEEDS

If you are worried about how technology issues are impacting your business, how management issues are demanding more time and how federal regulations are often a challenge to understand, you are not alone.

Setting aside bottom-line concerns, these three areas are among the top legal challenges that companies are facing today. But don't despair. The best advice is to get legal advice, and do it sooner rather than later.

"The biggest pitfall to avoid is not involving your lawyers until there is a problem," says Steve Zack, former president of the American Bar Association. "Legal counsel is much more cost-effective if it is used preventively rather than as the crisis begins to brew.

"Any issue where your lawyer has not been a partner in your decision-making process is going to become costly," he says. "Lawyers are there to look over the horizon with you and help you weigh your options. You'll make more fully informed and better decisions that will save you time, money and legal headaches."

Here are some tips to find solutions to some of today's common problems.

Avoid the legal pitfalls of technology

Issues with technology, be it over social media, privacy or data security, are among the top concerns of companies. Many employees today are from what might be called the "TMI Generation" because they reveal too much information — and information leaks could lead to problems.

"They don't have a good sense of the walls that should exist between a public personality and their private life," Zack says. "So they could wind up tweeting information on Twitter about an account or an internal project."

Too much information can also affect the hiring process. One of the tools employers have started using to screen job candidate applications is to search Facebook and MySpace pages to eliminate the people who might not be desirable to represent their company.

"The problem with using social media is that it gives the person making the hiring

CASH FLOW FIX

Law firms need to review payment practices to maximize profits

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decision information that in many ways that person should not have while making that decision,” says Rick Bales, professor at Northern Kentucky University Chase College of Law. “So, for example, you go on to Facebook and get somebody’s birth date, you now know how old they are.”

To avoid a possible age discrimination suit, you should have a low-level staff member do the screening.

“You should have one person who is not a decision-maker do those social media screenings who will report only (necessary) information to the person actually going to make the hiring decision,” Bales says.

To protect the company, rules and policies drawn up by your attorneys for use of the Internet and social media should be included in employee manuals.

“It’s important that companies set clear standards and then train and retrain employees on those issues,” Zack says.

Issues that should be considered in the policy will vary because of the nature of the business, how it is operated and what kind of electronic devices are provided to employees. Most concerns are over limiting what can be said through social media about a company and that any social media policy will have to pass muster under the National Labor Relations Act — employee use of company computers during work time is subject to being reviewed at any time for security and other purposes.

Data security is another technological concern. With a number of companies using cloud computing, where data is stored over the Internet at remote sites, how secure that data is and who can access it are major issues.

“It’s crucial that companies protect their customer data from hackers,” Zack says. “There could be serious liability issues otherwise.”

A data security breach can be devastating for a company, and you need to have steps in place internally in the event that something does happen. Just losing a laptop computer with company information on it can cause major problems.

The cloud computing concept opens new chapters on areas of law that are evolving. If the wrong people get access to your data, do you have a claim against the Internet provider who is managing the data? What about an employee who leaves the company and has the ability to hack your site?

You should consider both the upside and the downside of social media, privacy and data security concerns with your legal counsel.

“Good legal counsel will make the journey easier,” Zack says.

If your legal firm is considering ways to improve its payment practices — and, ultimately, its cash flow — alternative fee arrangements and online payable tools are good bets.

But a word of advice from Gavin Geraci, senior vice president, specialty segment executive, PNC Business Banking: couple that examination with an evaluation of the firm’s financial policies.

“Any time you’re going to adopt a new billing arrangement or structure, use that as an opportunity to evaluate billing and collection policies,” Geraci says. “It’s likely going to result in a change in revenue, a change in how clients see their charges, and it’s going to have an impact.”

Review how it will potentially impact the budget with which you started off the year. The payables cycle particularly deserves review if the firm does work on a contingency basis.

“Take advantage of the data that is available to the firm to really do some analysis and test the impact of any changes you might make on the firm’s cash flow, because if you do it to any magnitude, it will likely have some impact,” Geraci says.

Moving to a flat fee instead of a traditional hourly billing and using credit cards to pay legal fees are two growing trends being used to improve payment practices.

“Using a credit card as a payment vehicle tends to be a pretty effective means for some firms to accelerate those receivables,” Geraci says. “It’s something more businesses are amenable to, and it’s a little outside the traditional invoicing that you will normally see.”

Other methods to accelerate payments include online tools, such as online bill pay, offered by financial institutions. These tools can also offer access to escrow accounts, master accounts and subaccounts so that legal firms can effectively manage those.

Technology aside, some good, old-fashioned business smarts can help improve the picture.

“You have to actively manage your past-due accounts,” Geraci says. “A lot of times those conversations are going to lead to greater collection than if no efforts were made. That follow up could be the difference between full payment and a write-off.” <<

Gavin Geraci is the senior vice president of business banking and specialty segment executive at PNC Business Banking. He has more than 19 years of experience in the financial services industry.

HOW TO REACH: PNC Bank, www.pnc.com/attorneys or (877) 535-6316



Take training seriously

When it comes to management issues, there is no shortage of pitfalls to be concerned about. Probably the most historical involves promoting a high-performing worker into a management job and failing to give that person the training to be a supervisor.

“This is a perpetual problem from hundreds of years ago — the training of low-level supervisors,” Bales says

There is a huge difference in the skills that it takes to go from a front-line production worker or sales associate to managing people.

“The skills are not necessarily transferable, and the new managers are often not well-trained,” he says. “They don’t know the slightest thing about sexual harassment law or the meaning of nondiscrimination. They haven’t had any training with working with people or dealing with workplace conflicts. They don’t necessarily know how to motivate people.”



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The proper approach involves training the person and monitoring the results.

“Start at the bottom and make sure that somebody promoted from the line or the sales force or whatever into a supervisory position for the first time has adequate training and is supervised closely enough so the folks at the top can figure out what challenges that person has and what kind of training that person might need,” he says.

The downside is that there are many potential problems, for example, discrimination suits, claims of bullying and group dynamics issues.

“The person needs to be an effective manager — very often union campaigns grow out of employees being upset with a manager or supervisor who doesn’t know how to manage,” Bales says.

Sometimes not keeping your house in good order causes headaches that could have been prevented with some foresight.

Take, for instance, employers who have the idea they should document what happens with their workers. Having records of incidents and situations may not offer the security desired.

“Employers still do a terrible job of that, by and large,” says Josh Fershee, associate professor at the University of North Dakota School of Law. “Giving someone a difficult time in one department and moving them to another department, sometimes even with a promotion or a perceived promotion, and then they get to the point where they want to terminate the employee and everything in the records indicates no problems.”

What typically goes hand in hand with that is not having some clearly stated policies. If that is an at-will employee, he or she can be terminated at any time for cause.

“But employers periodically will make promises that as long as you do a good job or as long as sales are good, you have a job here,” Fershee says. “Well, that can change that status to some degree, and those relationships are certainly something to watch out for.”

Play it safe with the feds

The number of federal regulations keeps rising over the years, and along with it comes the concern of not just complying with all of them — but what do they mean?

One area where misunderstanding the law is creating problems involves compliance with the Americans with Disabilities Act.

“Discrimination is something that they have to take a real amount of care to avoid and obviously comply with the civil rights laws at all levels,” says Carol Miaskoff, assistant legal counsel for the Equal Employment Opportunity Commission.

“But the positive is that the employer is able to benefit from the talents and the contributions of people with disabilities as opposed to just losing that.”

Reasonable accommodation enables employers to make some low-cost modifications that enable an injured or disabled person to stay on the job — as opposed to being out of work.

“That seems to me to be a win-win situation for employers,” says Chris Kuczynski, assistant legal counsel for the EEOC.

Difficulties may arise over the sense of what is an accommodation for the worker. “They need to make a reasonable accommodation, but what is reasonable?” Fershee says. “Some instances where businesses get into trouble is that they really try to avoid hiring somebody, whether they know it consciously or not, who comes in with a potential disability, because they don’t want to have to accommodate it.”

Doing so may actually create a problem that wouldn’t have existed had the company just moved forward the way it should

DON'T LET TECHNOLOGY CHANGES PUT YOU AT RISK

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have. For example, if businesses think it is going to be too hard to accommodate someone in a wheelchair, some companies don't want to tell the person that's why so they just skip the application even though the person is fully qualified otherwise.

"In fact, the law generally says if you can't accommodate, you don't have to," Fershee says. "Reasonable accommodation is a fairly low standard most of the time."

You need to go to an expert in the ADA area and ask what you need to do.

"Oftentimes, the answer is something that works for everybody," he says. "Or there's something that doesn't work for everybody, but it can insulate them from liability because they've done what they are supposed to: 'We looked into how much it's going [to cost] to accommodate and we can't.' That is often a legitimate defense."

While virtually unheard of as a term before the 1970s, sexual harassment is a concern in the workplace. Sexual harassment policies are in place at nearly all major companies, schools, universities and the military.

"It's always a problem in the workplace for two reasons: No. 1, the perception of the person who was on the receiving end of the harassment is always different from the person who was on the giving end of the harassment. No. 2, the legal difference between banter/flirting and sexual harassment is kind of blurry," Bales says.

The giver may perceive that it was not harassment at all. He or she may perceive it as an expression of sexual interest or as good-natured flirting or as banter while the person on the receiving end may view it very differently and take it much more personally.

"Even a trained attorney or an HR manager may not know at first glance if this is crossing the line or not," Bales says.

An employee who has a workplace problem needs to have somewhere to go so that the employer gets notice early on and can correct the problem before it rises to the level of legal harassment.

"If this is the first time that the employer has received notice of it and the employer takes prompt action, the employer's not going to get sued, or if he does get sued, he's going to win," he says. "If a company is big enough and can afford an ombudsman, I think those are terrific. But if not, use someone who is functioning as an HR person." <<

HOW TO REACH: American Bar Association, www.americanbar.org; Salmon P. Chase College of Law, Northern Kentucky University, chaselaw.nku.edu; School of Law, University of North Dakota, law.und.edu; U.S. Equal Employment Opportunity Commission, www.eeoc.gov

AS technology becomes an ever-increasing part of most businesses, so does the need to become more sophisticated on issues regarding intellectual property — patents, trademarks and copyrights.

"An electronic process now can be easily patented," says Eric Macey, partner in Novack and Macey LLP. "Because technology is claiming more of business, you have to become more familiar with it, because you are consistently signing license agreements to do business, and you are consistently getting rights to use technology in a certain way from people who hold patents."

You have to make sure you know that what you're doing is consistent with the law, particularly when you are outsourcing, a practice which is growing because of the cost benefits and flexibility that it can offer.

"When you outsource, you enter into contractual relationships that involve technology, which may involve patent rights, trademark rights and other rights," Macey says. "You have to understand that you can't just look at a form agreement and sign it. It's not a simple purchase order. It's not like that anymore."

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Eric Macey,
partner,
Novack and Macey LLP

that," Macey says. "I think in the old days you just signed them and didn't read the fine print, but I think it has greater implications now because there is greater liability than you had before." <<

ERIC MACEY, partner in Novack and Macey LLP, is a co-founder of the firm. He focuses on areas such as arbitration, business torts, class-action defense, commercial litigation, employment law, financial services and others. He has a clientele consisting of a wide range of business corporations and institutions, investment ventures, partnerships and individuals. Macey has extensive trial experience in state and federal courts throughout the country and has acted as both an arbitrator and mediator in alternative dispute resolution settings.

