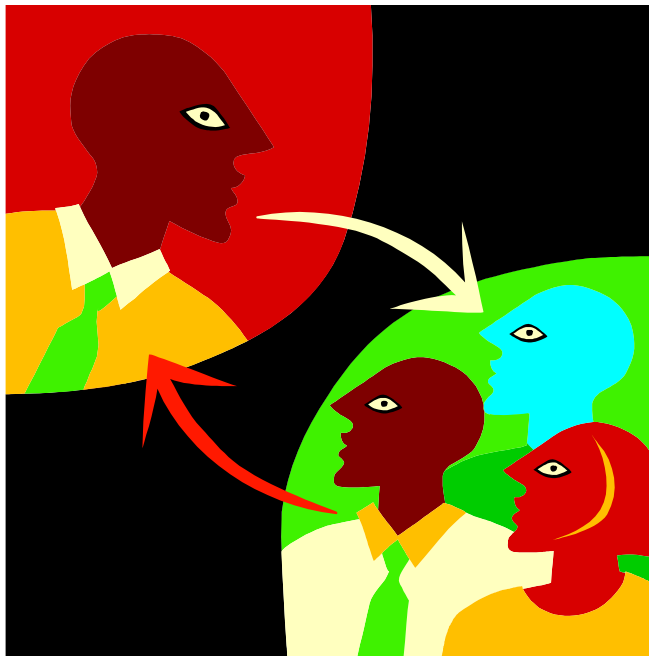




## MANAGING WITHIN THE LAW



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**The materials that follow are not intended to be legal advice or to offer solutions to individual problems. Questions about individual problems, policies or procedures should be addressed to the employment law attorney of your choice. The Florida Bar does designate attorneys as Board Certified in Labor and Employment Law. One should not assume from the materials presented that certain practices and policies are or are not acceptable. Instead, these materials are intended to be used as an instructional aide, in conjunction with training by experienced employment law counsel, in educating managers and supervisors in the legal ways to make employment decisions and the fair treatment of employees.**

# MANAGING WITHIN THE LAW

## I. BACKGROUND: EMPLOYMENT LAWSUITS ON THE INCREASE

Employment decisions are some of the most important functions which a company must perform. However, each employment decision you make has the potential to evolve into a major legal problem. With increasing regularity, employers have been asked to explain their employment decisions to a judge or jury. Each decision can become the subject of time-consuming and costly litigation, a risk you should not take lightly.

No matter how logical you believe your employment decisions to be, no matter how certain you are that your motives are just, the danger remains. An ambitious plaintiff's lawyer often can convince a jury, consisting of people who do not understand your business and who are influenced by emotions, that a management decision made under the pressures of a working environment was wrong. Some of the problems managers are faced with today include:

### A. Employment Litigation Is Increasing

Every time that the United States Congress or a state legislature meets, new legislation restricting an employer's right to run its business is passed. Many of these laws are poorly drafted, provide employers with little or no guidance, and often create more questions than answers. Additionally, courts are continually interpreting these laws with conflicting results, thereby adding to the confusion.

### B. Composition of the Work Force Is Changing

Workers today are more mature and better educated than in the past and are fully aware of their rights under employment laws. In recent years, the number of people in the work force between the ages 35 to 47 has increased by 38 percent while the number of people age 48 to 53 has increased by 67 percent. Moreover, the percentage of the work force which is protected by employment laws is increasing. Of the new entrants into the work force, approximately 85 percent will be in one or more protected categories.

### C. Lawsuit Damages Are Increasing

A recent study which sampled California cases involving employment issues found that plaintiffs won two-thirds of the jury trials and received an average award of \$650,000. Here in Florida, a review of 50 verdicts in employment discrimination cases resulted in an average award of \$250,000.00. This figure does not include attorneys' fees which are always substantial. Florida jury verdicts in sexual harassment cases have averaged from 2 to 5 times this amount. An attorney in an age discrimination case was recently awarded \$400.00/hr. for work he did on a successful trial. Attorneys' fees range from \$50,000-\$250,000.

**D. Personal Liability for Managers Is Increasing**

Increasingly, applicants and employees have sued not only employers but also management officials personally for wrongful or discriminatory employment decisions. As an individually named defendant, a supervisor may be personally liable to an applicant or employee for all or a portion of the damages awarded.

**E. Management Is Guilty Until Proven Innocent**

Contrary to the usual legal principle that a person is innocent until proven guilty, the reality under state and federal employment laws is that management is guilty until proven innocent. Employment laws generally require the plaintiff to initially prove an employment violation with very little evidence. In order to establish a “prima facie” case of discriminatory treatment in a hiring case, a plaintiff must prove only that:

1. He/she is a member of a protected class.
2. He/she applied for an open position for which he/she was qualified.
3. He/she was rejected for the position.
4. An applicant not in the protected category was hired for the position.

The burden of proof then shifts to the employer to prove that its actions were not illegal. If the employer fails to meet this burden, it will lose the case.

The proof problem is further compounded by the fact that when the proof consists solely of the word of an applicant or employee against the word of a supervisor, judges and juries will often find for the employee. Accordingly, written documentation supporting the employer’s side of the case is essential. The rule is, if it is *not in writing*, it did not happen.

**II. EMPLOYMENT DISCRIMINATION**

Federal, state and local anti-discrimination laws prohibit employers from discrimination against any individual with respect to employment on the basis of the following protected categories: race, religion, sex, national origin, handicap, disability, age, marital status, veteran status, benefits eligibility, union affiliation, concerted protected activity, and workers compensation history. Discrimination on the basis of sex includes discrimination based on pregnancy, childbirth or other related medical conditions and sexual harassment. Discrimination occurs in the workplace by disparate treatment or adverse impact.