courageous thought leadership content
Financial Management of a Marketing Firm

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For all the bookkeepers, accountants, controllers, and CFOs who have been saying all these things for years

With no one listening until a high-priced consultant comes in from a long ways away and says the same things
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One of the courses I was forced to take when working toward an MBA was one on financial management. It was a night course, taught by a graduate assistant whose English skills made it clear that his native language was something else.

I remember getting hung up on the vocabulary, first. As I’d ponder the meaning of a word I’d just then learned, he would prattle on and on, using the word in various contexts to get through his prepared notes. With each subsequent use of the word, I’d sink deeper and deeper into the quicksand of ignorance...and sometimes panic.

All of it left a really sour taste in my mouth about all things financial. So much so that I never really bothered to fully understand the financials of the agency I owned for six years. It seemed out of reach, first, and then there didn’t seem to be a context for it, second. By that I mean that it was one thing to understand the concept of, for example, the assets and liabilities on a balance sheet. But it was something else altogether to understand what sort of ratios should be exemplified by a balance sheet. I just didn’t know much.

When I started this consulting practice, I had to force myself to understand the financial component of management—after all, principals the world over would be looking to me for guidance, and so no matter
what I felt about financial information, I simply had to understand it. Beyond that, I had to teach it in a way that principals could understand, if they wanted to. Better yet, I needed to explain it in such a way that they would want to conquer their fear of financials and want to begin seeing their business through a financial lens.

That gave birth to this manual, and I want to thank each of my clients for their very astute questions over the years. This manual is entirely reactive in nature, only in the sense that I’m reacting to what you want to know. The writing of this has taken nearly ten years of fits and starts, but I’m happy with how it’s come together.

I hope that you’ll find good, plain help in here and conquer your own fears.

If I can learn financials, you certainly can too.
Money isn’t everything.
It isn’t nothing, either.

You should be in business primarily for two purposes. The first is to make money, and the second is to have an impact via effective work. That second purpose follows the first almost immediately, and in fact I would argue that they are inextricably tied together. Without having an impact, making money on its own is hollow. And without making money, impact is compromised simply because clients won’t listen and because you won’t have the requisite time to get deeply enough into any given situation to understand it and make a difference.

So this manual is about money, and I make no apology for that. The reason many firms don’t make money is because they don’t understand it and because they don’t have a strong enough positioning to enforce the principles of money that they do understand. Instead, they muddle along with a low utilization (see chapter 9) because of their own unique blend of under-pricing and over-servicing.

We aim to fix all that in this manual, and I hope you’ll read it carefully and with an open mind. Some of the content is just good old fashioned common sense, but some concepts are truly unique and will stretch you a bit.
My suggestion in reading this manual is to take it one chapter at a time through chapter 11 (there's a joke in there about bankruptcy, but I'll resist), reading each chapter slowly and methodically at a pace that allows you to understand every single point.

From there, just skim chapters 12 through 21 and refer to them as necessary. Other than chapters 2 through 4, each chapter is self-contained and can be digested on its own.

Thank you for buying this manual, and thank you for raising the bar at your own firm. Best wishes as you implement sound financial management at your marketing firm.
This chapter concentrates on the most common areas where legal disputes arise, covering copyright, trademark, social media, client contracts, and employment and HR issues.

Those in the business of providing marketing or communications services for clients generally place a high value on their talent pool—and for good reason: the creative work product generated by the company’s employees is essential to its success. Frequently, however, legal problems arise from that very creative work. Often, a dispute occurs due to an issue between an employer and employee or a problem relates to the creative...
message, marketing content, or material the company develops. It seems hardly a day goes by that there isn’t a headline relating to a controversy in the workplace or a “who had what idea first” story in the entertainment and marketing trades. Knowing what areas may cause legal exposure is a critical first step toward ensuring that business proceeds as planned—and that whatever publicity comes your way is the welcome kind.

This chapter will focus on some of the most frequent areas in which disputes arise and help guide you past some of the most common pitfalls. As they say, forewarned is forearmed!

**FOCUSBING ON COPYRIGHT**

“Can I use someone else’s creative work without permission?” “How do I protect myself from someone trying to use my creative work without permission?” Although the answers to these common questions are complex, and require a close look at the specific material and rights that someone is trying to use or protect, some important best practice guidelines can be offered.

Using Someone Else’s Copyright. You do not need permission to copy and use in the United States a creative work (including a book, play, newspaper article, photograph, painting, sculpture, song or sound recording) that was “published” in the U.S. before January 1, 1923. This rule applies regardless of whether the creator of the work was American or foreign, and regardless of how much of the creative work is used. For a work to have been “published” in the U.S., copies of that work had to have been distributed to the public in the U.S. If a work was only displayed or performed in the U.S., but not distributed, then the work has not been published. Best Practice: know when the work you want to use was published.

Keep in mind that the unrestricted right to use a pre-1923 work may not extend to more recently created versions or copies of that work. Therefore, while a Leonardo da Vinci painting will be free for use, to use a photograph of that painting taken in 1978 you will need permission from the photographer. Similarly, while a Mozart requiem will be free for use, to use a 1973 sound recording of an orchestra playing that score you will need permission from the record label that released that recording.

Also note that you do not need permission to copy and use any of the facts, ideas and principles that underlie a creative work, no matter
how unique those elements are. Only the original expression used to articulate facts, ideas and principles is protectable by copyright. For that reason you are free to copy, for example, a basic “boy meets girl,” “dog meets cat,” or “dish meets spoon” storyline from a motion picture as the basis for creating your own original work, but you cannot copy any of the plot points, dialogue or video clips that communicate those storylines and that are unique to the motion picture.

The legal landscape may be considerably more complicated if you want to use a work outside of the U.S., for example if you want to use a work on the Internet (where your use may be deemed to be global, even if you are targeting only a U.S. population). There is no global copyright law, and every country has its own rules about when copyright exists and when it expires. Best Practice: talk with your attorney about consulting with foreign legal advisors when you want to use creative work without permission on the web.

PROTECTING YOUR OWN COPYRIGHT

Your original creative work is protected by copyright from the moment of its creation and regardless of whether you register your copyright with the U.S. Copyright Office.

Best Practice: register your copyright whenever possible and as soon as your work is published. Registration is fairly simple and inexpensive and confers valuable benefits. Most significantly, if your work is infringed, registration entitles you to sue for “statutory damages,” which is a fixed amount of money that can range as high as $150,000, plus attorneys’ fees and court costs. If you wait more than three months after publication to register your copyright, then you cannot collect statutory damages or attorneys’ fees and costs, and you will be able to collect only damages in the amount of your actual losses and the infringer’s actual profits resulting from the infringement. This damages calculation can be costly and difficult to prove.

Generally speaking, if you create an original creative work, you will own the entire copyright in that work unless you assign all or part of that copyright away. (If you choose to assign the copyright be aware that the assignment must be in writing or it will not be valid.) However, exceptions to this rule exist for employees and independent contractors. If you are an employee, your employer will own the copyright in the original
creative work that you produce within the scope of your job. If you are an independent contractor, the person or business that hired you will own the copyright in the original creative work that you create under hire, but only so long as your work falls into a handful of narrow categories (including illustrations that accompany another work, and elements of a motion picture or other audiovisual work), and only so long as you sign an agreement identifying your work as a “work made for hire.” If you are an independent contractor and your creative work does not fall into one of the specified categories, then you will be deemed the owner of copyright in that work—until you assign your copyright to another person or business in writing.

As the owner of copyright in a work, you will hold the following exclusive rights:

First, the right to make copies of the work.
Second, the right to make derivative works based upon the work (for example, a book based on an article, a sculpture based on a photograph, a sound recording based on a musical composition, and a foreign language translation of an English-language text).
Third, the right to distribute copies of the work.
Fourth, the right to perform or display the work publicly (except that generally the owner of copyright in a sound recording does not have the exclusive right to perform the work publicly).

Not every use of your copyrightable work that implicates one of the above rights and that occurs without your permission will be an infringement, however. Copyright law contains a “fair use” exception that allows use of works without permission for such purposes as news reporting, commentary, criticism, research, and scholarship. Fair use is an elastic doctrine and can allow other people to use your work freely for such unflattering and profitable purposes as parody or satire. Copyright law also contains a “de minimis” exception that allows certain fleeting, non-substantial or inconspicuous uses of works without permission. A lawyer can provide you with a more detailed analysis of how the fair use and de minimis doctrines apply to a particular copyright use.

COPYRIGHT LICENSING

The owner of the copyright in a work may license all or part of that copyright to someone else to use. Exclusive licenses of a work must be in writing, but non-exclusive licenses may be (and often are) oral.
Best Practice: all license agreements should be in writing and signed by both parties. Additionally, whether you are the licensor or the licensee of a work, you should review and become familiar with the terms of your licenses (especially any use, date, and geographic restrictions), and consider using a rights management system that allows you to easily monitor compliance with license terms.

FOCUSING ON TRADEMARK

Words, designs, slogans, sounds, smells, product configurations, packaging configurations, and other elements used by a person or business to indicate the source of its goods or services are trademarks, and may be protected by both state and federal law. Trademarks enable consumers to distinguish between the source of different goods and services, and correspondingly provide information to consumers about the relative quality of those goods and services. Trademark law is analogous to consumer protection law, in that it ensures that consumers who encounter a trademark on a good or service in the marketplace are not deceived or confused about the source and quality of that good or service.

Using Someone Else’s Trademarks. Except in limited circumstances, including the fair use exceptions, you must have permission and a license to use another’s trademark.

There are two fair use exceptions in trademark law. “Classic fair use” (also known as “statutory fair use”) is use of a trademark that is an ordinary word or image for its ordinary meaning, rather than for its trademark meaning—for instance, use of the word “Amazon” to describe a river, rather than the name of an online bookstore, or use of the image of a crocodile to indicate an animal, rather than a brand of polo shirt. “Nominative fair use” is use of a trademark to identify the mark owner’s good or service, where no other terms would adequately or efficiently identify that product or service—for example “Chicago Bulls” to identify the NBA team that plays in Chicago. You may not claim that your use of another’s trademark is nominative fair use if your use implies any sponsorship or endorsement between the trademark owner and your good or service, or if you use that trademark more than reasonably necessary to identify the trademark owner’s good or service.

Best Practice: even if your use of a trademark appears to you to be a fair use, consider consulting with counsel to confirm that determination,
and to assess the level of legal and practical risk that your contemplated use of the mark may present. Note that some trademark owners are known to be particularly aggressive in challenging unauthorized uses, even if those uses are fair and therefore legally permissible.

In choosing brand names, taglines or other trademarks for your goods or services, it is important to consider whether such trademarks may cause consumer confusion. Experienced trademark counsel should be enlisted to conduct a search for any proposed trademark to determine whether that mark poses a risk of infringing on another person’s or business’s trademark rights.

Trademark owners can also protect against uses of their marks that imply or express endorsement or association. Even if your goods or services are different from those of the mark owner, your use of a trademark, if it constitutes a false designation of origin, is subject to enforcement. Under federal law, remedies are available under this theory even when a mark owner has not registered its trademark at the federal level.

Protecting Your Own Trademarks. In the United States, you will acquire rights in your trademark from the moment you begin using the mark. The scope of those rights will be limited to the geographic areas in which you use the mark. To acquire broader nationwide rights for marks that are not actually being used nationwide you will have to register your mark with the United States Patent and Trademark Office. When it comes to enforcement of your rights, the most viable trademarks are those that are distinctive. If a mark is classified as suggestive, fanciful, or arbitrary (e.g., “Apple” for computers), a court will deem it inherently distinctive and protectable. If a mark is descriptive (e.g., “Beland” for a mattress store), it can qualify for protection if it has obtained distinctiveness or “secondary meaning” in the minds of consumers. Marks achieve secondary meaning through association with the source of the related goods or services over time. Merely generic marks (e.g., “Carwash” for a car wash) are not protected as trademarks. Features of a mark that are merely functional, meaning that they are essential to the use or purpose of the product or service, cannot qualify for protection. The more distinctive your mark is, the more likely it will be protectable as a trademark.

Best Practice: remain vigilant as to: (i) how your trademark is used by anyone to whom you grant permission to use the mark; and (ii) whether anyone is using your trademark without permission. To maintain the integrity of your brand, and thereby protect and strengthen the
value of your trademark, you must monitor and enforce the quality of any third-party goods or services that use your mark with permission, and demand that any unauthorized use of your trademark, particularly a negative or low-quality use, ceases. Use your trademarks in conjunction with the ® symbol (if federally registered) and the ™ (for goods) and SM (for services) symbols (if unregistered) and require all your licensees to do the same.

FOCUSING ON SOCIAL MEDIA

The rise of new social media communication outlets on the Internet, such as blogging, uploading videos on YouTube, and engagement on Facebook and Twitter, have created additional dimensions in which to consider copyright, trademark and other intellectual property issues. While such media are commonly thought of as an unregulated “Wild West,” in reality, numerous laws govern communications in these forums, and businesses should implement procedures to ensure that their own social media activity on behalf of clients, and their employees’ social media activity in both their professional and personal capacities, do not run afoul of these laws and do not inadvertently cause harm to business relationships.

The foundation of any social media policy is a recognition that the rules governing traditional communication media also apply on the Internet. You should implement social media guidelines, prepared by legal counsel, that all employees adhere to as a condition of their continued employment.

Intellectual Property Guidelines for User Engagement. The principles of copyright and trademark law discussed above remain important on the web. Permission may be required to use someone else’s article, quotation, photograph, video, trademark, design, or other creative content—whether in a blog post, a YouTube video upload, or a Tweet. Best Practice: use direct quotations sparingly to avoid accusations of copyright infringement. Use of third party creative content should occur only with the owner’s permission, or with the understanding that you will face some legal and practical risk if your use is unauthorized.

You may want to engage the public in crafting your message and creating content, influencing their online networks of peers or providing feedback about products and services. Unless you obtain permission through a release, assignment or website terms of use, any creative
expression that an individual submits to you is owned by that person. User-generated copyrighted materials to which you have not secured the necessary rights by assignment or license cannot be copied, distributed, displayed, performed, or incorporated into new works. User-generated content also might purposefully or inadvertently infringe on someone else’s trademark or copyright.

Best Practice: before soliciting user-generated content, determine to what extent you plan to use that content and get written consent (including, possibly, through a click-through agreement) that will allow you to use the users’ submissions in all media, territories, and time periods you need. If you give users permission to use your copyrighted or trademarked material, be sure to include any guidelines for that use. And have all users warrant that their submissions neither depict any third party without permission nor infringe any third party’s intellectual property rights. In anticipation that users may submit unauthorized third party content regardless of your warnings and safeguards, you should provide clear online terms of use and conspicuous notice and take-down procedures to ensure a prompt and thorough response to any reports of user-generated infringing material.

Employee Engagement on the Internet. Another advantage the Internet affords to marketers is the ability to engage in grass roots and word-of-mouth marketing. However, a marketer must always make clear to consumers in its online communications that it is speaking as a marketer and not as an ordinary consumer, so that consumers can understand and weigh the potential bias of those communications. Astroturfing, the practice of disguising a marketer’s planned campaign as a grass roots effort, has been deemed a deceptive practice by the FTC. Any website published by a marketer or agency to promote products or services should clearly and conspicuously disclose the sponsor(s) of the site. Likewise, employees should not pose as consumers when posting on blogs or social media websites. If employees make positive statements about clients’ products and services, even when those statements are made on the employees’ personal social media sites, they are required by the FTC’s Endorsement and Testimonial Guides to disclose their affiliation.

Just as with official communications, all statements made about products and services in blog posts, Facebook updates, and Tweets must be true, substantiated and not misleading to consumers. Be sure a claim
made on the Internet is backed by substantiation no less rigorous than if the claim were made in a traditional press release.

Err on the side of more disclosure, transparency, and substantiation so consumers will not be confused or misled.

Confidentiality. Social media sites make minute-by-minute updates easy, and are a tempting outlet for communications professionals eager to share the latest news about a business or its goods or services. Employees must take care, however, not to divulge confidential information, whether it involves new business pitches, financial information, product or service launches, or upcoming marketing plans. Disclosure of such information can breach legal and contractual obligations and destroy a communications agency’s reputation as trustworthy.

Best Practice: employees should be bound by an employment policy that clearly sets forth their confidentiality obligations, including with respect to online communications.

FOCUSING ON THE AGENCY CLIENT CONTRACT

The various components of an agency-client agreement interact to control the agency’s liability to its clients and third parties and the profitability of the agency-client relationship. Most advertising and marketing industry executives understand the effect favorable payment and billing terms have on the profitability of a client relationship, and to a lesser extent the importance warranties, indemnities, and limitations on liability have on limiting an agency’s exposure to claims and damages. However, many businesses overlook the impact that more subtle and seemingly innocuous contract provisions can have on the client relationship.

Chief among these clauses is the “compliance with all laws” provision, which typically reads: “Agency warrants that all services and work product will comply with all applicable international, federal, state and local laws, orders, rules and regulations.” While this warranty on its face may appear to be acceptable (i.e., why wouldn’t an agency comply with all laws?), this simple language places real, and often impracticable, affirmative obligations and responsibilities on the agency. For a marketing agency with an automotive client, for example, this provision obligates the agency to ensure that its advertising and public relations materials comply with all laws. So if, for example, the APR disclaimer in a car financing advertisement fails to comply with Regulation Z, and gives rise
to a consumer class action, or, if a commercial depicting an SUV driving aggressively prompts an FTC action, the automotive client justifiably may hold the agency responsible for the defense and cost of those claims under the blanket compliance with law and the accompanying indemnity for breach of warranty obligations in the agency-client contract.

Many clients recognize that their internal marketing and legal departments have special expertise in ensuring compliance with the laws that govern their business areas, and therefore often exercise independent review of the creative materials generated by their marketing agencies. Therefore, in practice, legal responsibility often is apportioned between the client and the agency such that the client assumes primary responsibility for ensuring that all descriptions concerning the client’s organization, products, services, and industry are accurate and meet all legal and regulatory requirements, and the agency assumes primary responsibility for ensuring that the materials it creates do not violate the rights of third parties. If this apportionment of legal responsibility is occurring in fact, then the agency-client contract should be amended accordingly, so that each party knows its role in avoiding claims, and so the agency is not assuming undue responsibilities.

Best Practice: the representations and warranties in agency-client agreements should be reviewed carefully with counsel. The agency should also undertake a periodic legal “tune up” with its form agreement to make sure the indemnity and other provisions properly allocate risk and are consistent with current trends.

**FOCUSBING ON EMPLOYMENT AND HR ISSUES**

The Independent Contractor/Employee Distinction. Here is a typical scenario: A company retains an independent contractor, and has the contractor sign an agreement memorializing the relationship. After several years, the company decides to terminate the agreement. At this point, the contractor, who now has an axe to grind with the company, hires a lawyer and claims that she should have been considered an employee all along. As a result, she seeks compensation for benefits that she should have received (health insurance, vacation, etc.), the employer’s contribution for social security (which the contractor was made to pay), and, if the contractor was paid an hourly or daily rate, overtime for any week in which she worked more than forty hours. These claims can result in significant liability for the employer.
Best Practice: analyze the true nature of your company’s relationship with so-called “independent contractors.” Do not take comfort in the fact that a worker agrees to be, wants to be, or even insists on being referred to as an “independent contractor.” If the relationship sours—or if the government conducts an audit—any earlier agreement will not prevail over the realities of the working relationship.

Courts focus on the following factors, among others, to determine whether the worker is truly an independent contractor or an employee: the employer’s control over the means the worker used to produce the requested results; the worker’s opportunity for profit or loss; the worker’s investment in the business (i.e., did the worker purchase equipment, or did the company provide it?); the permanence of the working relationship; the degree of skill required to perform the work; the extent to which services rendered are an integral part of the employer’s business; and the degree of initiative, judgment, and foresight exercised by the individual who performs the services.

Best Practice: Someone who is performing a task that is duplicative of a current employee should not be treated as an independent contractor (i.e., if you need additional staff for a project that you do not have the capacity to handle in-house). Those individuals should be brought on as temporary employees, not independent contractors. In general, someone who is performing a task that is a primary service of your company similarly is likely not an independent contractor (e.g., a worker who provides public relations services for a public relations agency’s clients likely is not an independent contractor but a worker who paints the office or updates the computer operating system of a public relations agency may be).

The consequences of misclassifying employees as independent contractors can be significant. True independent contractors are paid like any vendor, without withholding taxes, unemployment insurance, benefits, etc. At year-end, independent contractors will receive a 1099 tax form, not a W-2. Thus, if a worker is later discovered to have been misclassified, the employer may be responsible for paying back wages for overtime pay with interest, social security taxes, unemployment insurance taxes, the value of group health and other benefits, taxes, and workers’ compensation. In some states, employees may even be permitted to seek liquidated damages. Employers should be keenly aware of this issue as the Department of Labor has recently announced that it intends to emphasize enforcement in this area.
Exempt vs. Non-Exempt Employees. The Fair Labor Standards Act ("FLSA") requires that employers classify all jobs as either exempt or non-exempt. Non-exempt employees must be paid overtime pay at one and one-half times the employee’s regular rate of pay for all hours worked in a week in excess of forty hours. One of the most common mistakes employers make is misclassifying non-exempt employees as exempt, thereby depriving them of overtime pay. This can prove costly for an employer either if the Department of Labor audits the employer or, as is more often the case, a misclassified employee or former employee makes a claim for back overtime. The employee or former employee could also seek penalties, interest, and attorneys’ fees.

Best Practice: make the correct classification of your employees a top business priority. Understand that the correct classification of exempt or non-exempt status requires a careful case-by-case analysis of the employee’s duties, which may (and likely will) change from time to time.

Generally speaking, in order to be exempt, an employee must: (1) be paid on a salary basis, meaning receive the same weekly salary regardless of the number of hours worked, of not less than $455 per week (approximately $23,660 per year, based on a fifty-two week year); and (2) satisfy one of the exempt duties tests. The exempt duties are executive, administrative, or professional employee (typically called “White Collar Exemptions”).

It is, of course, easy to understand that senior managers who customarily direct the work of others and make recommendations about hiring or firing others are “exempt” workers, which means they are not required to be paid overtime if they work more than forty hours a week. On the other hand, it is often more challenging to determine whether an administrative employee should be exempt from an entitlement to overtime pay. To be exempt, the administrative employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers and must include the exercise of discretion and independent judgment with respect to matters of significance. An administrative employee is not to be confused with an “Administrative Assistant” or “Secretary”—titles which generally are non-exempt. Lastly, the professional exemption is limited to those whose work requires an advanced degree or “advanced knowledge”, such as doctors, lawyers, scientists, and some fine artists.
Several states, including California, have also enacted overtime pay regulations, some of which provide greater protection than those provided for by the FLSA. Where an employee is covered by both federal and state wage laws, the employee is afforded the greater benefits or more generous rights provided for under the different parts of each law. Be aware of any state wage laws applicable to its employees.

Best Practice: regularly review employees’ job descriptions as well as the actual duties he performs, as the test for exemption is based on actual duties, not just job descriptions. Have a clearly defined overtime policy and specify whether it requires your employees to obtain permission to work overtime or to work through the employee’s lunch time as well as procedures for approving overtime. (Note however, if an employee works overtime even without permission, he/she must be paid. The proper remedy in such a situation is disciplinary but wages still must be paid). Finally, because you must maintain accurate records of the hours non-exempt employees work, you should have a policy regarding recordkeeping and explain to non-exempt employees that all work hours must be recorded.

Sexual Harassment. If an employee is sexually harassing a fellow employee and you do not know about it, can the employer be held liable? The answer is “maybe.” A protective measure that all employers should take is to implement, distribute, and follow an anti-harassment policy and a clearly-defined complaint procedure.

Sexual harassment is unlawful in the workplace. Generally, it is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Best Practices: implement the following in order to limit exposure:

First, develop a written policy concerning sexual and other forms of unlawful harassment, which clearly defines unlawful harassment and explains that it is not only illegal, but also against company policy, and will not be tolerated. The policy also should explain the penalties for sexual harassment, which could include punishment up to and including termination.
Second, create a complaint or grievance procedure for employees who believe that they have been sexually harassed. The procedure should make it clear to whom the employee should file a complaint (the options should include at least one man and one woman) and should make provisions for employees to file a complaint with someone other than their supervisor in case the alleged harasser is a direct supervisor, and these individuals must be trained in how to respond to complaints. The procedure should call for a prompt investigation and a quick and effective resolution. Finally, the policy should contain an assurance that retaliation for a sexual harassment complaint will not be tolerated, as it is unlawful for an employer to retaliate against an employee who files a sexual harassment complaint, participates in an investigation, or opposes discriminatory practices.

Third, make sure all employees receive a copy of the policy upon hire and that each employee signs a written verification that s/he has received, read, and understands the policy.

Fourth, to minimize vulnerability to sexual harassment complaints, provide sexual harassment training for all employees and make attendance mandatory. Sexual harassment training should include an explanation of what sexual harassment means and how it can be recognized, confronted, and avoided. The training should also include a clear explanation of the company’s sexual harassment policy and complaint procedures.

Fifth, take sexual harassment complaints seriously and respond to them as quickly as possible.

Following the above steps will help you reduce the risk of costly harassment claims and, equally as important, provide an atmosphere for employees that is free from harassment. Bear in mind, however, these are only general guidelines. Certain jurisdictions, notably New York City, impose even higher standards for employers and merely having and following a complaint reporting policy and procedure may not adequately defend employers against liability. All employers should consult their employment law counsel for guidance on the specific requirements of the jurisdictions in which the employer operates.

UNPAID INTERNS

Many companies hire interns either for the summer or during the school year, often for class credit. All too commonly, interns are not paid
for their services, as employers consider the intern’s compensation to come in the form of real-world experience, an entry for their résumés, or for class credit. Many employers assume that as long as the interns receive credit, they do not need to be paid. This assumption is incorrect.

With limited exception, all “employees” must be paid at least minimum wage under federal and state law. However, under guidelines issued by the Department of Labor, “trainees” are not “employees” and, therefore, do not need to be paid. Employers must be certain that any unpaid interns qualify as trainees and are not “employees” who must be paid.

Best Practice: the Department of Labor and California’s Division of Labor Standards Enforcement have recently issued additional guidance on their rules for when interns are not deemed to be “employees” and therefore need not be paid. The six-factors that support a finding that the intern need not be paid are: (1) that the internship is similar to training that would be given in an educational environment; (2) that the experience is for the benefit of the intern; (3) that the intern does not displace regular employees; (4) that the employer derives no immediate advantage from the activities of the intern (on occasion, its operations may actually be impeded); (5) that the intern is not necessarily entitled to a job at the end of the internship; and (6) that the employer and the intern both understand that the intern is not entitled to wages for the time spent in the internship.

Companies should review their internship programs to ensure compliance with this six factor test. If interns do not satisfy all six criteria, the company may be subject to an action for violation of the minimum wage laws, which could include double damages and attorney’s fees.

FEDERAL PROTECTIONS FOR NURSING MOTHERS

The recently enacted health care reform law—the Patient Protection and Affordable Care Act (PPACA)—requires all employers covered by the Fair Labor Standards Act to provide reasonable break time for nursing mothers and a private space in the workplace to express milk. While many states, including New York and California, already have laws in place regarding break time and lactation areas for nursing mothers, the PPACA applies to employers in all states and is slightly different than the laws of individual states, so all employers should take heed.
The PPACA requires that employers provide: (1) reasonable break time (which does not need to be paid) for an employee to express breast milk for her nursing child for a period of one year after the child’s birth, and the employee must be permitted to take such a break whenever she has the need; and (2) a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk.

Companies that employ fewer than fifty employees are not subject to these requirements if it “would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.” Additionally, if a state law has greater protections for nursing mothers than the new federal law, employers must follow the state law requirements.

Best Practice: the provision regarding nursing mothers, unlike many other provisions of the health care reform law, was effective as of the enactment of the law. Employers who have not already done so should immediately designate a room or other suitable private place(s) for use by lactating mothers. Additionally, employers should work with nursing mothers to provide the required break time and avoid any discrimination against women who express milk at work.

BEFORECAST

So today, with the scarcity of jobs the number of unpaid internships has climbed. Companies can hire unpaid internships year-round, following some government criteria, which in most cases we know are not observed. This is unfair to those who can’t afford to spend a summer working for free, and to those who have graduated and are trying to start their career. How much worse could it be? Free labor has always been associated with slavery. Today, working for free is unheard of, especially in capitalist America. Ironically, it looks like that is what capitalists are looking for now.

Vasilka Atanasova, Unpaid Interns—the Slaves of the 21st Century
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