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## 5 Things to Do When You're the New In-House Employment Lawyer

### From the Experts

*Lynne Hermle*

I took an in-house employment job as a third-year lawyer decades ago. It was a tumultuous time to be counsel at an AT&T company. After a very long and stable history, Ma Bell had divested herself of local service providers through an agreed-upon consent decree. Organizational and other chaos ensued.

My first day was not what I had expected. The office furniture had not arrived, and I sat on the floor (ironically, on a thick phone book) to take calls. (For youthful readers, a phone book is a thick directory listing the names and phone numbers of people in a city or town.) The first call was from a regional manager whose employees had gotten into a bar fight and had been arrested; the manager wanted to know what to do about the jailed employees. The second came from a hysterical-sounding



*BrianAJackson*

sales support manager. Her boss had rented a tiger to make a grand entrance for a sales kickoff. The hotel was refusing the tiger entrance, and the employees had gathered for the meeting. What should she do?

Not a day was dull in the next three years. Much of what I learned through my time in-house forms the foundation for

how I interact with clients now. I explain to my associates that almost every in-house lawyer spends much of the day drinking from a fire hose, trying to keep up with the daily crisis while grabbing rare quiet time to add value by advising on issues like policies and practices.

Most of the employment issues on which I worked required a

full understanding of the company's background, mission, culture, organizational structure and other factors that affect how management interacts with employees. For example, AT&T had never implemented an at-will employment policy. Managers and employees (many of them with decades of tenure) operated on the theory that no manager would terminate an employee without a heavy showing of very good cause. The company's severance agreements did not include releases, and people seemed surprised by my insistence that we not pay a year's salary as severance without an agreement that any disputes between the departing employee and the company had been resolved. Working through these issues wasn't a simple matter of understanding the legal principles involved.

Here are key questions I wish I'd had firmly in hand when I arrived at that empty office:

**1. First of all, get a handle on the landscape.** How many employees are there, and where are they located? How many contractors and consultants perform services? What is the management structure through which they report? Are any employees unionized? How is HR organized and deployed, and is there a separate ER function?

What responsibilities do the HR folks have, and which do they handle on their own without counsel? Where are the hot spots (i.e., claims, concerns, disputes), and what seems to be causing them? Are layoffs likely to hit in the near future, and if so, might they hit federal or state WARN targets? Is the company a federal contractor, and if so, who is responsible for complying with affirmative action and other requirements? (See Orrick Equal Pay Blog.)

**2. Review the key documents.** Is the offer letter in good shape, with appropriate at-will language? Does it have—and do you want—an arbitration clause for employment disputes? If so, does the arbitration clause need updating (for example, to include a class action waiver, a different service provider or removal of an unhelpful discovery provision)? Does the company's application for employment comply with legal requirements? Does the company use executive contracts, and if so, are they in need of review before new hires come on board? Are form severance agreements in good shape, or do they need review, including to ensure that they comply with the SEC enforcement efforts regarding confidentiality provisions? Is the EEO policy up-to-date? Are there

other policies that need review, such as those concerning military, disability, pregnancy or other leaves? Is there a confidential information agreement? Does the language address the most current technology issues the company faces? Is there an outdated handbook that needs review and redistribution? Does the company maintain benefit plans, including for stock options/RSUs/bonuses, and how recently were they reviewed (and are the dispute provisions in good shape)? Are independent contractors or consultants retained with contracts, and if so, do they have appropriate indemnity provisions?

**3. What needs to be audited, either internally or externally?** Does the company seem to employ an overabundance of exempt employees in jobs that may not meet the applicable standards, including the new FLSA compensation mandates? (On May 18, 2016, the DOL issued Final Regulations on the FLSA white-collar overtime exemptions, which, among other changes, almost doubled the minimum salary threshold to \$47,476 per year. Employers have until Dec. 1, 2016, to comply. See Orrick Employment Law Blog.) Do independent contractors perform key functions, and do they remain with

the company for long periods of time? Are there appropriate timekeeping mechanisms for nonexempt employees, and should compliance reminders be sent? Has management looked at equal pay issues, and, particularly given the recent scrutiny of this issue by regulators and the plaintiffs bar, should the company audit (under privilege) compensation to address gender issues? Does the company comply with other employment-related requirements (such as California or other state mandates requiring final paychecks, with accrued vacation, to be paid to terminated employees on the final day, and compliant wage statements)?

**4. Figure out the training needs, including what you can provide and what you need outside help to present.** Does the company have anti-harassment supervisory training that complies with California or other state law? If it does, do you want to broaden training to include sessions for all employees? Do managers need training on complying with EEO laws, SOX or Dodd-Frank or other legal issues? Does HR seem to be muddled about reasonable accommodation of disabilities and the interactive process, how to structure the decision-making process for layoffs, how to draft

an OWBPA disclosure, how best to communicate a termination? Would a series of lunch meetings on topics of their choice be helpful?

**5. Decide if you've got the right outside counsel.** Ideally, you want straight-shooting experts who value the relationship and will move fast to respond to questions or otherwise support you. Does the company already have a relationship with experienced employment counsel familiar with the business and culture? Do those lawyers have the expertise you need, including internationally (if applicable), or a trusted outside network? Are the lawyers responsive and practical? Is the current fee arrangement one that will work for both sides, and does it make sense to explore a fixed-fee arrangement, at least until you've resolved initial concerns? Can the same firm provide other expert advice you may need (executive compensation, benefits, traditional labor/union)?

As you consider the answers to these questions, don't miss one of the best parts of in-house practice—the deep understanding of and connection to the core business. Read business plans and forecasts. Have lunch with the HR/ER/Benefits folks and ask if it would be helpful for

you to attend department meetings. If you provide training to your HR clients, consider inviting legal department colleagues and offering MCLE credit (some topics may qualify for the Elimination of Bias credit). Ask your boss to introduce you to senior managers you have not yet met, so that you're included in discussions on upcoming employment issues. And keep learning all aspects of the business, which will help you provide increased value in your legal advice.

*Lynne Hermle is a nationally recognized partner in Orrick, Herrington & Sutcliffe's employment practice, which was named California Labor and Employment Department of the Year by The Recorder, a Corporate Counsel affiliate. Prior to joining Orrick, she was in-house counsel for AT&T, where she handled employment matters for several states.*

