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THREE MOST UNDERUTILIZED EMPLOYMENT LIABILITY PREVENTION TOOLS

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CurrentsLetterUThis week U is for under utilized – the readily available liability prevention tools that, in our estimation, employers most often neglect to use to their advantage.

1. The extra step. Before terminating an employee with a medical issue, that is. As we have written here and here, much FMLA and ADA liability is preventable if you will methodically work through the communications steps that years of case law tells us courts are looking for. The sooner you start, the sooner you can finish. I tell employers: I know it's convenient, but taking one more step with the employee will pay off. If you think the employee has had plenty of chances to get you documentation from the doctor or to demonstrate that he/she can do the job, write that down – this is when we would terminate, but we're not, *we are giving you one chance* to accomplish X by date Y. Don't get stuck with an avoidable lawsuit because you wouldn't take one more step to nail down your file and make it clear you fulfilled your legal obligations.

2. Job descriptions. Job descriptions define the target of the employee's job duties that is critical to so many employment law disputes. In determining whether an employee is exempt under the Fair Labor Standards Act, the job description is Exhibit A in explaining what the employee *really* does. In the above-mentioned area of FMLA, ADA and other employee health related legal issues, the job description is the guidepost for whether an employee can perform his/her job, and the baseline for what is a reasonable accommodation. In discrimination cases, the job description is the starting for determining who is liable as a supervisor under the U.S. Supreme Court's *Vance v Ball State*. The list goes on. A job description signed by the employee within the relatively recent past is too powerful a tool in litigation not to have one.

3. The gut check. Specifically, the termination gut check phone call to counsel. Every termination involves risk, even those that do not involve risk factors that may be obvious such as the employee having made a past harassment or other legal complaint, or membership in one or more classes protected by discrimination laws. Indeed, with relatively few exceptions, employment litigation is about terminations. There are

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unlawful hiring or failure to promote cases, but the vast majority of employment law is about terminations. Is there any event in your business that is as predictably a potential liability event? Certainly major commercial disputes or serious injuries involving the company may involve greater liability, but is there anything else in business where there is a predictable moment, voluntarily initiated by the company, that we know is a potential litigation event? Yet employers often trigger this legal event without talking to a lawyer, and miss issues that could have been avoided. It is a classic example of paying a little now rather than a lot more later. Protect yourself and the company, make the call. If you are ready, it will be a few minutes. If it is more than a few minutes, you might not have been ready, so it will help get you there.

Companies that are using these three tools are spending less time and money in court and more time focused on their true mission.