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Management

Treat Your Partners Well

Firms should heed a decision that may confer on partners equal employment opportunity rights.

Managing an organization composed of successful lawyers is famously difficult. The very traits that make lawyers successful are found in abundance in law firm partners—a healthy skepticism, a penchant for debate, and a high degree of self-confidence—coupled with a sense of ownership in the enterprise and a desire to be informed and consulted about decisions large and small. Firm management's job got even harder in April, with a Supreme Court ruling affirming that partners may have equal employment opportunity rights.

Partners responsible for exercising authority over their colleagues in law firms have traditionally spent little time worrying about their exposure under federal and state EEO laws. They have surely sought to avoid bias and the appearance of bias—by their nature, law partnerships tend to be sensitive to concerns of equity and stereotyping—but managers have generally analyzed personnel decisions affecting partners without a sense that the firm is likely to be sued for employment discrimination.

In recent years, however, wise managers have begun to sense that their decisions might not be wholly exempt from scrutiny by judges or juries. Three parallel developments have fostered their growing concern.

First is the fact that many firms have taken, or are considering taking, actions that in other contexts are often challenged on EEO grounds, such as asking partners with lower substantive or economic performance to leave the firm, or de-equitizing them, or forcing retirement at a stated age. In an increasingly competitive profession, these efforts to enhance institutional performance and improve the firm's AmLaw profitability ranking are seen as important measures for retaining top talent and recruiting laterals.

Second, as firms have striven to upgrade their economic performance, they have been evolving, subtly or headlong, toward corporate forms of governance. It is increasingly common in large firms for a subset of the partnership to make important decisions, such as those involving the admission of new partners and distribution of partnership profits.

This evolution is unavoidable: It is both inefficient and impractical for a firm of 500 lawyers to give all partners the information they need to participate in wise decision making, particularly on sensitive personnel issues. Corporate-style governance has become more common in another, more literal sense: To minimize liability risks, more and more firms have opted to conduct business as limited liability corporations.

Third, the case law has begun to erode the idea that partners cannot seek the protection of the EEO laws. In 1984, the U.S. Supreme Court ruled in *Hishon v. King & Spalding* that decisions to admit new partners are covered by the EEO laws. In subsequent years, it has become increasingly clear that decisions affecting partners who lack the attributes of full partners may be subject to EEO scrutiny as well. A few federal courts have found that the title "partner" is adequate to defeat application of the EEO laws, but the prevailing view—reflected, for example, in Judge Richard Posner's opinion for the 7th Circuit in *EEOC v Sidley Austin* (2002)—has allowed for the possibility that a person found lacking in the basic attributes of partnership may be a protected "employee" for purposes of the anti-discrimination statutes.

Label-Based Analysis Rejected

In April, the U.S. Supreme Court illuminated the landscape in *Clackamas Gastroenterology Associates P.C. v. Wells.* The plaintiff in that case had sued the medical practice that employed her, alleging violation of the Americans With Disabilities Act, which imposes various obligations on employers with at least 15 employees. The threshold question was whether four physicians who owned the practice (as shareholders in the professional corporation) were "employees" for purposes of meeting the ADA's 15-employee threshold. The medical practice defended by asserting that shareholders are like partners, and thus are not "employees" for purposes of EEO coverage.

The 9th Circuit ruled for the plaintiff on somewhat simplistic grounds, holding that if the physicians availed themselves of the tax and liability advantages associated with being employees of a professional corporation, they could not simultaneously claim to be partners for purposes of the EEO laws.

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The Supreme Court flatly disagreed, rejecting analysis that relies on the labels workers may be given. Instead, the Court agreed with the EEOC that employee status is to be determined through the common-law "control test" dating from early master-servant doctrine. Thus, individuals denominated "shareholders" may nevertheless be "employees" under the ADA if they are subject to control by the organization.

The Court recognized six indicia of control, though it noted that different indicators might apply in different cases: the organization's ability to hire, fire, and set rules for the individual; the extent to which it supervises his or her work; whether the person reports to someone more senior; ability to influence the organization; the parties' intent concerning status, reflected in written agreements; and whether the person shares in profits, losses, and liabilities. These factors go to the ultimate question: "whether the individual acts independently and participates in managing the organization, or . . . is subject to the organization's control."

The *Clackamas* ruling confirms what has seemed increasingly clear: Lawyers denominated "partners" in law firms may be "employees" for EEO purposes. Viewed in light of current wisdom on law firm management, the ruling may create difficult tensions. Many large firms see their long-term success as linked to their ability to move toward the kind of centralized decision making that creates liability risk under *Clackamas.* Over time, they are establishing more corporate-style business units, led by strong practice managers, so as to be able to navigate the competitive landscape nimbly, and to allow the majority of partners to remain focused on the practice of law.

If firms want increasingly corporate-style management, but the control associated with centralized management implies greater EEO risk, how might that tension be addressed? First, firms should bear *Clackamas* in mind when structuring their partnership and developing their governance model. Giving all partners some role in deciding central issues is likely to mitigate EEO risk. Committee or board recommendations on promotions and lateral hires can be subject to the approval of all partners; so can recommendations on the allocation of shares. And involving partners in the approval of key policies—particularly those likely to raise EEO issues, such as retirement—is important too.

What if a firm decides that employment law concerns aren't the most important considerations, that the need for efficiency, agility, and liability protection are paramount? In that case, the key is to manage partners with the same care and respect for process given to personnel decisions on staff and associates. Treat your partners as well as your clients would treat their senior employees. Among the more important precepts:

1. Set clear expectations. Make the criteria for success as a partner as clear as possible, including articulated generic expectations and individual goals (with each partner involved in establishing his or her own).

2. Provide regular feedback. The cardinal rule of sound personnel management is "no surprises." Provide periodic feedback, so that each partner knows how performance is viewed. When bad news comes without foreshadowing, the recipient commonly reacts with anger and suspicion, which may then be expressed as legal claims. Remember that upward and downward movement in compensation by itself is too veiled a message; there are too many factors in the calculus and too many ways for someone to rationalize the result.

3. Be candid. In a partnership, those titled "partner" understandably think of themselves as owners and expect to be treated with honesty and directness, even if they don't exercise management authority.

4. Know the facts and be able to explain your decisions clearly and without contradiction. "Because we've decided so" is not an adequate justification to a highly educated professional. Illustrating performance problems with specific examples is far better than offering no examples, but getting the facts wrong is far worse than saying nothing.

5. Anticipate and be prepared to address issues of comparative treatment. Law firm partners commonly have a keen sense of equity and often challenge a course of action that seems to make unfair distinctions. Anticipate the complaint "Why me but not him?" and be prepared to respond, generically if not specifically.

These are hallmarks of good HR practice, wholly aside from their ability to mitigate legal risk. They are second nature in personnel management at sophisticated companies. In a law partnership—an environment where people have a particularly acute sense of process, fairness, and entitlement—it is increasingly important to remember these basic rules when dealing with partners. The ruling in *Clackamas* doesn't make these concerns any more important, but it may raise the costs of ignoring them.

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