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FEARLESS FIRING: HOW TO PROPERLY LET EMPLOYEES GO

Presented by:

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FEARLESS FIRING: HOW TO PROPERLY LET EMPLOYEES GO

WHY ARE WE HERE?

WHY ARE WE HERE?

- ◆ Reduced Legal Exposure
- ◆ Effective Workforce
- ◆ Accomplished by:
 - Following (Legal and Non-Legal) “Best” Practices
 - Managing Employees Better

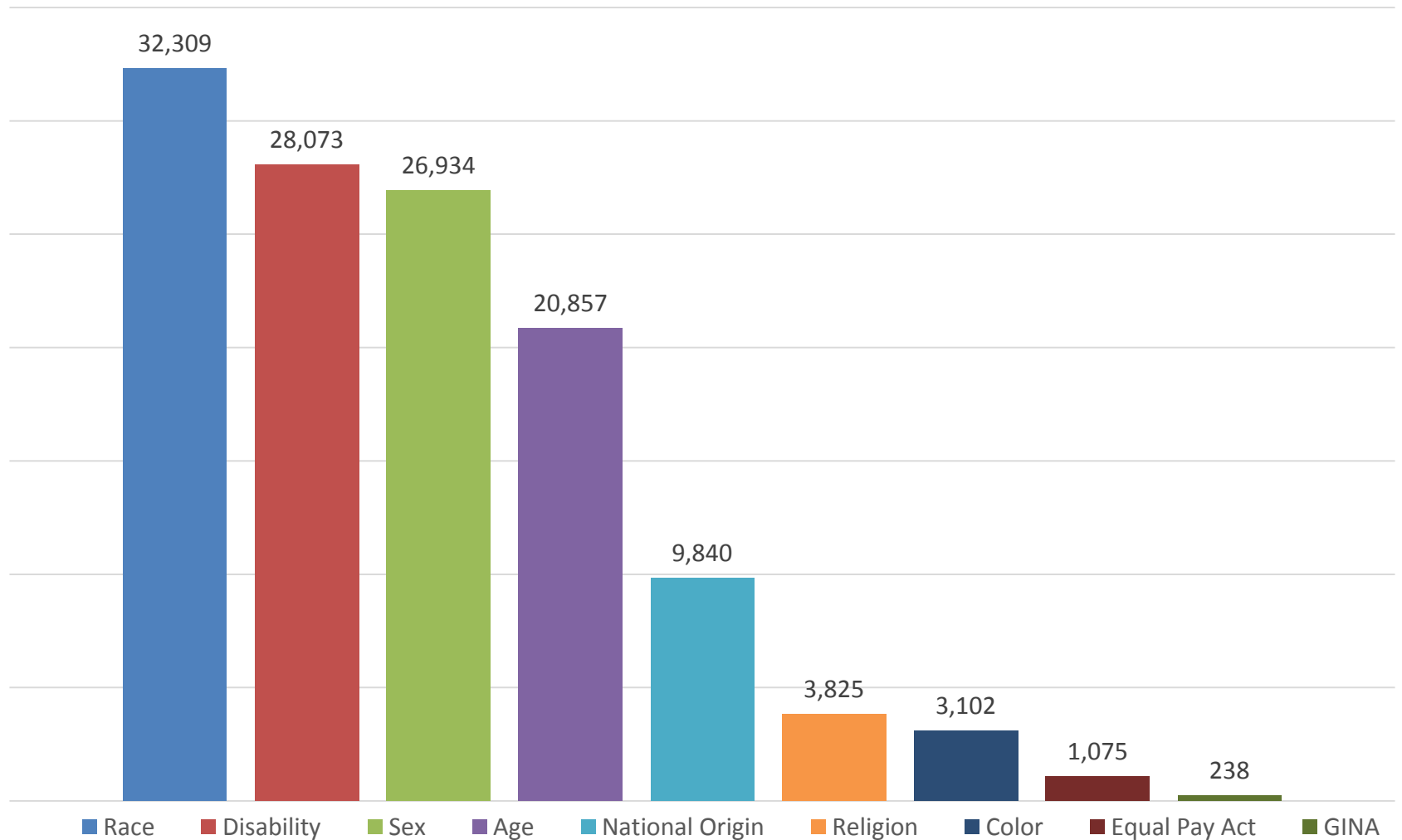
WHY ARE WE HERE?

- ◆ The “best” termination is one that never happens
- ◆ The second best alternative is having sound policies and procedures that lay a good foundation for:
 - Hiring the right workforce
 - Effectively managing that workforce
 - Terminating the relationship when necessary in an appropriate manner and with good documentation

WHY EMPLOYEES SUE - AND WIN

- ◆ Disrespect at time of termination
- ◆ Giving no reason or false reason for termination
- ◆ Firing for poor performance when performance reviews were good and no other documentation of poor performance
- ◆ Bad timing of termination (soon after complaint or leave)
- ◆ Can't find other work
- ◆ Nickel and diming on pay issues at termination

EEOC CHARGE FILINGS BY TYPE (FY 2016)



EMPLOYMENT-AT-WILL

◆ Basic Rule:

- Everyone is employed "at-will," unless the employer has caused the relationship to become otherwise

◆ Employment-At-Will Means:

- No specific duration – indefinite – no fixed or specific period
- Employer or employee may end the employment relationship at any time and for any or no reason

EXCEPTIONS TO EMPLOYMENT-AT-WILL

- ◆ Written or oral “contract”
 - Collective Bargaining Agreement
 - Offer Letter
 - Employee Handbook
 - Verbal Promises

DISCRIMINATION: PROTECTED CATEGORIES

- ◆ Race and Color
- ◆ National Origin
- ◆ Sex and Pregnancy
- ◆ Religion
- ◆ Age
- ◆ Disability
- ◆ Sexual Orientation/Transgender
- ◆ Marital Status
- ◆ Military/Veteran Status

EXCEPTIONS TO EMPLOYMENT-AT-WILL

Retaliation

- ◆ Complaints of discrimination
- ◆ Workers' Compensation claims
- ◆ Whistleblowing

HYPOTHETICAL No. 1

Cristina worked for the Hospital as an LNA. One day Cristina was repositioning a patient in bed and felt a pull in her left shoulder. Cristina's injury was covered under the workers' compensation statute. Cristina treated her injury with physical therapy and ultimately surgery. Based on her work restrictions as a result of the injury, Cristina was out of work for the statutory 18-month period. At the conclusion of the 18-month period, Cristina was still unable to return to her position as an LNA.

- Can the Hospital terminate Cristina because the return-to-work period under the workers' compensation law has expired?

HYPOTHETICAL No. 2

- ◆ Ed applied for employment as a mechanic for a small local rigging company. Ed was told during the interview process that he would need to obtain his DOT medical card. A few weeks later, management asked Ed about the status of his medical card and Ed advised that the doctors were still gathering medical information because he had suffered a stroke several years earlier.
- ◆ Shortly after this conversation, Ed threatened in a loud and belligerent voice in the lunch room that if he were fired for not getting his medical card he would complain to OSHA about alleged safety violations – which he had not previously mentioned to anyone - and he would "make the company pay."
- ◆ Some of Ed's co-workers complained to management about Ed's grumbling, increasing anger about the medical card issue and his threats against the company.
- ◆ The company is concerned about Ed's behavior and feels that his threats against the company are inappropriate and offensive, particularly for a probationary employee less than 2 weeks on the job.
 - Can the company terminate Ed's employment?

HYPOTHETICAL No. 3

- ◆ Julio is the most recently hired of 5 HR generalists at the Company. He is 2 weeks into a planned 2-month FMLA leave. The Company needs to reduce its workforce due to a sudden and significant downturn in profits, and has decided to terminate 2 of the 5 HR generalists, on the basis of length of employment.
 - Should the Company terminate Julio's employment?

EXCEPTIONS TO EMPLOYMENT-AT-WILL

Protected Concerted Activity

- ◆ Applies to non-supervisory employees
- ◆ Section 7 of the National Labor Relations Act (NLRA) protects concerted activity
 - Complaints by two or more employees or on behalf of other employees
 - Employees are protected against retaliation for discussing or complaining about the terms and conditions of employment

EXAMPLES OF PROTECTED TOPICS

- ◆ Safety
- ◆ Wages
- ◆ Benefits
- ◆ Overtime
- ◆ Assignments
- ◆ Staffing
- ◆ Other terms and conditions of employment

LAWFUL OR UNLAWFUL?

- ◆ Lydia, a domestic violence advocate at a non-profit organization has been vocally critical of 5 of her co-workers. One of the criticized employees, Marianna, sent a Facebook message from her personal computer at home to the other 4 employees. The co-workers were upset and while off-duty, posted some unflattering messages about Lydia on Marianna's Facebook page. Lydia also responded on the same Facebook page, demanding that the four "stop with ur lies about me."
- ◆ Lydia complained to her supervisor that the postings violated the employer's "zero tolerance" policy against "bullying and harassment."
- ◆ The employer investigated and, agreeing with Lydia that its policy had been violated, fired the 5 co-workers.

LAWFUL OR UNLAWFUL?

- ◆ After being spoken to by his manager in what he perceived to be a rude manner 2 days before a union election, Perez, a server for a catering company, posted the following comment about his manager on Facebook:
 - "Bob is such a NASTY MOTHERF@%!#\$ don't know how to talk to people!!!!!! F@%\$ him and his entire F@\$%ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!
- ◆ The Company learned of the post and, after an investigation, Perez was fired for violating the Company's anti-harassment policy.

LAWFUL OR UNLAWFUL?

- ◆ Jennifer, a child protective services worker, posted several inflammatory messages to her Facebook page that disparaged many families and individuals whose homes she visited in a generalized manner, e.g.:
 - "If you physically abuse your child, someone should physically abuse you...If you don't like my rules, too bad. I have a Ph.D., and you don't, so I get to make up my own imaginary rules."
- ◆ The posts were seen by numerous Facebook friends including a defense attorney and a circuit court judge.
- ◆ The posts were forwarded to Jennifer's employer, who felt the posts reflected Jennifer's own bias which, in her position, she was supposed to put aside.
- ◆ Jennifer was terminated.

THE REALITY

- ◆ The process of discipline and separation requires difficult decisions
- ◆ Employees should have a chance to improve or make amends
- ◆ Discipline and separation involve people's lives and livelihoods
- ◆ Juries will judge based on fairness, not “at-will” status



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HIRING THE RIGHT WORKFORCE

REVIEW THE APPLICATION AND RESUME

- ◆ **Carefully review** the job description, application, and resume submitted
- ◆ Look for missing periods of time or "information gaps"
- ◆ Look for suspicious entries such as stated "reasons for leaving" past jobs
- ◆ Look for past jobs which appear relevant and those which are not
- ◆ Get to know the applicant on paper to prepare to meet and interview him or her in person
- ◆ Ask applicant to provide last employment evaluation

THE INTERVIEW

- ◆ Ask specific questions about past job experience
- ◆ Ask open-ended questions:
 - Why do you want to work with us?
 - How do you prioritize work?
 - How have you gotten along with your past bosses?
 - How do you follow guidelines or instructions?
 - What is your philosophy about work, about hospitality?
 - What can I tell you about the job, about our organization?

DISCUSSION

- ◆ You are favorably impressed by an applicant's skills, education, and experience, and he submitted several glowing recommendation letters including one from the CEO of a competitor whom you respect. However, you note that he's worked for 4 different employers over the past 8 years.
 - What steps would you take to determine if the applicant's job-hopping is cause for concern?



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MANAGING EMPLOYER LIABILITY

THE IMPORTANCE OF PERFORMANCE MANAGEMENT

- ◆ Employees want and have a right to know how they are doing in their work
 - **The goal is corrective action**
- ◆ Unless job issues are discussed with the employee, he or she may have an inflated opinion of job performance
- ◆ Regular communication provides employees with an opportunity to ask questions and clears up any misunderstandings about what is expected
- ◆ Honest and open communication also helps build strong relationships based on mutual respect and confidence

WHY DOCUMENT?

- ◆ To have consistent, complete records of each aspect of employee's performance and behavior, good and bad
- ◆ To help prevent and/or survive employment litigation
- ◆ Historical reference

PERFORMANCE PROBLEM-SOLVING

- ◆ Is it an **ability** problem - does the employee have the skills and knowledge?
- ◆ Is it a **clarity** problem – is employee clear on goals, objectives or targets?
- ◆ Is it an **organizational help** problem - what resources are needed?
- ◆ Is it an **incentive** problem - do you know any underlying causes which could impact employee's motivation?
- ◆ Is it an **evaluation** problem - is there a lack of day-to-day feedback?
- ◆ Is it an **environmental** problem - is there a problem with the employee's work environment, i.e., getting along with co-workers?

PERFORMANCE MANAGEMENT OBJECTIVES

An employee should be able to answer "yes" to the following questions about his/her performance

- ◆ Do you know the standards by which your supervisor evaluates your performance?
- ◆ Has your supervisor assisted you in evaluating strengths and weaknesses for your future performance?
- ◆ Do you feel your contribution and performance are measured fairly?

PRACTICAL TIP No. 1

- ◆ Do your employees know the workplace rule, policy, practice or expectation, and the consequences of violating those rules?
 - Are your rules, policies, practices, and expectations reasonable, and do they serve a business purpose?
- ◆ Have you distributed the rule/policy and do you have proof of doing so?

PRACTICAL TIP No. 2

- ◆ Have other employees been treated consistently for similar offenses?

ENFORCE EXPECTATIONS CONSISTENTLY

- ◆ **Perceptions of unfairness are a leading cause of litigation**
- ◆ Most common reason a terminated employee sues his employer is over conduct for which other employees were not terminated
- ◆ Be consistent:
 - Has this problem arisen in the past?
 - How was it handled?
- ◆ Are you suddenly deciding to “crack down” on conduct that was previously tolerated?

PRACTICAL TIP No. 3

- ◆ Do you have written documentation of the employee's performance?

ESSENTIAL DOCUMENTATION

- ◆ Job description
- ◆ Performance appraisals (at least annually)
- ◆ Personnel file
 - Caution: supervisor notes
- ◆ Counseling/disciplinary records

THE CHARACTERISTICS OF GOOD DOCUMENTATION

- ◆ Limited to performance and behavior
- ◆ Specific
- ◆ Objective
- ◆ Accurate and verifiable
- ◆ Complete
- ◆ Includes corrective steps, not just infractions
- ◆ Free of hearsay, innuendo, supposition
- ◆ Free of emotion
- ◆ Free of references to protected characteristics
- ◆ Timely
- ◆ Clearly identifies the author
- ◆ Signed and dated by employee or otherwise establishes that employee was notified

NONEXISTENT DOCUMENTATION CAN SINK YOUR CASE

- ◆ Jurors expect key decisions to be documented
- ◆ A lack of documentation raises red flags
- ◆ Remember e-mail is an excellent way for managers to create a record of verbal warnings, performance problems, etc.
 - However, be judicious in your use of e-mail for commentary about employees
 - Consider it a formal record which will last forever

SAMPLE: DISCIPLINARY/COUNSELING NOTICE

Employee: _____ Department: _____ Supervisor: _____

Date of Occurrence: _____

Discipline:

☐ Counseling ☐ Verbal Warning ☐ Written Warning
☐ Suspension ☐ Dismissal ☐ Other

1. Statement of the problem (e.g., violation of rules, standards, practices, unsatisfactory performance):
2. Prior discussion or warnings on this subject (e.g., oral, written, dates, etc.):
3. Statement of Company policy on this subject:
4. Summary of goals/corrective action to be taken:

Please be advised that failure to correct this behavior or further violation of Company policy will result in disciplinary action, up to and including termination from employment.

Employee Comments: _____


Employee Signature: _____ Date: _____

Supervisor Signature: _____ Date: _____

Distribution: Copy to Employee, copy to Supervisor, Original to Human Resources

PRACTICAL TIP No. 4

- ◆ Be honest when evaluating employees
- ◆ Don't give a raise if not deserved



PRACTICAL TIP No. 5

- ◆ Have you investigated the alleged incident?

INVESTIGATION TIPS

- ◆ Select investigator
- ◆ Review pertinent policies
- ◆ Meet with complaining witness and get his/her version of events
- ◆ Employee awareness:
 - What is employee's prior record? Any warnings or PIPs?
- ◆ Identify potential witnesses
 - Do you have reliable witnesses?
 - Does employee have any favorable witnesses?
- ◆ Consider searching for e-mail, voicemail, telephone records, recordings, photographs, etc.
- ◆ Consider whether IT needs to be involved to obtain and preserve documents

INVESTIGATION INTERVIEW TIPS

- ◆ Consider having a witness present to listen and take notes
- ◆ Select a private, comfortable location
- ◆ Prepare a list of questions in advance
- ◆ Listen; don't interrupt
- ◆ Pin down dates, times, witnesses
- ◆ Take good notes, using witnesses' own words
- ◆ Follow up on new information
- ◆ Explain that no conclusions have been reached
- ◆ Do not express opinions
- ◆ Do not make promises (other than to conduct a thorough investigation)
- ◆ Be aware of confidentiality issues

PRACTICAL TIP No. 6

- ◆ Do you have legitimate, non-discriminatory reasons for the termination?

LEGITIMATE REASON

- ◆ Work rule or policy violated
 - Progressive discipline vs. immediate discharge
- ◆ Failure to meet legitimate job expectations
 - Prior warnings and opportunities to improve
 - PIP not satisfied

PRACTICAL TIP No. 7

- ◆ Will the employee's replacement be outside the protected class?

HYPOTHETICAL No. 4

- ◆ Lily is 53. Her performance is substandard. Her manager Kristen complains that Lily's work output is significantly below department standards, she is resistant to change and frequently challenges Kristen's instructions, and she has a habit of calling in sick on Mondays. As the year-end annual evaluation time approaches, Lily ups her game. Kristen wonders if perhaps she has been too demanding and she gives Lily an overall performance assessment of "meets expectations". By mid-February, though, Lily's performance has sunk to her previous unacceptable level. Frustrated, Kristen asks HR for approval to terminate Lily.
 - Should HR approve the termination?

HYPOTHETICAL No. 5

- ◆ Mariah has been putting in long hours over the past month on an important client project. The client is very pleased with the outcome. Ivan, Mariah's supervisor, is quick to praise Mariah's performance in a group meeting and he tells her that a similar project is coming her way and he's counting on her to do another outstanding job.
- ◆ Mariah, stressed and exhausted, yells that there's no way she's going to do another f*ing project and storms out of the meeting.
- ◆ Ivan doesn't want to fire Mariah because she is a valued employee. However, Ivan is aware that Raul, another employee, was fired several months ago for insubordination, although the incident with Raul occurred in private and did not involve profanity.
 - **Can Ivan discipline rather than terminate Mariah?**
 - **Should he?**



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EFFECTIVE TERMINATION PROCEDURE

BASIC PRINCIPLES

Be Honest with the Employee

- ◆ **Example:** If the employee is being terminated for performance issues, then say that. Don't characterize the termination as a downsizing / job elimination if that is not true.

BASIC PRINCIPLES

Have a Clear and Consistent Basis for Termination

- ◆ Make sure basis for termination is consistent, documented, and communicated:
 - To employee
 - In personnel file
 - In termination letter
 - In response to unemployment request
 - To agency in response to Charge of Discrimination

BASIC PRINCIPLES

Treat the Discharged Employee with Dignity and Respect

- ◆ **Example:** Conduct the termination meeting in a confidential manner. Don't parade the terminated employee through the office space to collect his/her belongings with an armed security guard trailing behind.
- ◆ **Example:** When terminating the employee, ask yourself, "What would a jury think about how I am treating this employee?"

BASIC PRINCIPLES

Be Confident (With Your Decision)

- ◆ **Example:** You did your homework, you checked your facts, you gave the employee the chance to tell her side of the story. You have determined that termination of the employee is not only legitimate, but it is in the best interest of the organization. The termination meeting is not the time to waffle about the decision and create the impression that you are indecisive.
- ◆ But what if the employee says her performance is subpar due to bullying, hostile work environment, harassment, etc.?
 - How should you react?

BEST TERMINATION MEETING PRACTICES

- ◆ Under what circumstances should you suspend a termination meeting and potentially re-evaluate the decision?

BEST TERMINATION MEETING PRACTICES

- ◆ **Example:** During a termination meeting, an employee who is being terminated for attendance infractions informs you that she repeatedly asked her supervisor for FMLA leave. Unless you know the employee's statements are untrue, this would present a situation where you should suspend the meeting to investigate these new facts.

TERMINATION MEETING

- ◆ Keep it short and be direct
- ◆ Do not argue or debate
- ◆ What you say may be used against you later
- ◆ Be honest and state correct reasons for decision
- ◆ Make reasons broad enough to cover all possible factors
- ◆ Choose least inflammatory wording
- ◆ Allow the employee to respond but express “your view is noted but we will have to agree to disagree”

EFFECTIVE TERMINATION PROCEDURE

- ◆ Get HR involved to ensure consistency and compliance with EEO laws
- ◆ Is documentation in order?
- ◆ Select the appropriate words, time and place
- ◆ Do not wait so long that your remarks have lost their relevance
- ◆ Consider safety and security issues
- ◆ Have a witness present

OTHER TERMINATION CONSIDERATIONS

- ◆ Was the employee provided with an exit interview?
- ◆ Will we provide a reference for the employee?
- ◆ Who will communicate with the employee and prospective employers post-employment as needed?
- ◆ Is a severance package and release appropriate?
- ◆ Do you want to provide outplacement services?

POST-TERMINATION

- ◆ Document Termination Meeting
- ◆ Technology/Property
 - Notify network administrator so that computer access can be curtailed
 - Arrange for routing of email and phone calls
 - Disable access to the building
 - Collect company property
- ◆ Inform those with a business need to know
- ◆ Communicate with employees what they can/cannot say:
 - Individual References
 - LinkedIn References

ABOUT DEBRA WEISS FORD

- ◆ Licensed in New Hampshire, Massachusetts and Maine
- ◆ AV (Preeminent) Martindale-Hubbell Peer Review Rating, the highest rating in legal ability and ethical standards
- ◆ Rated "2016 Top Rated Lawyer" by American Lawyer Media and Martindale-Hubbell
- ◆ Listed as 2015 and 2016 "Lawyer of the Year" in Best Lawyers in America (Labor & Employment Law)
- ◆ Named Best Labor and Employment attorney in New Hampshire, Business New Hampshire Magazine
- ◆ Listed in Top New Hampshire Lawyers in Labor and Employment, New Hampshire Magazine
- ◆ Elected as a Fellow to the College of Labor and Employment Lawyers
- ◆ Listed in New England Super Lawyers (Top 100 attorneys in New England)
- ◆ Listed in New England Super Lawyers (Top 50 Women in New England, Employment & Labor)
- ◆ Listed in Chambers USA as one of the top Lawyers in Labor and Employment

PRACTICE AREAS



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Class Actions and Complex Litigation



Collegiate and Professional Sports



Corporate Diversity Counseling



Corporate Governance and Internal Investigations



Disability, Leave and Health Management



Employee Benefits



General Employment Litigation



Government Relations



Health Law and Transactions



Immigration



International Employment Issues



Labor and Preventive Practices



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Wage and Hour



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Workplace Training

THANK YOU

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