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# Top Employment Law Issues for Paralegals

*The Legal Intelligencer*

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Paralegals may sometimes feel like Rodney Dangerfield -- they don't get no respect! Fortunately, employment laws do not discriminate against paralegals.

Law firms and their employees are subject to the same employment laws as other companies. Paralegals therefore enjoy an ever-growing array of rights and protections against unfair and abusive treatment at work.

The most common areas of employment litigation involving paralegals include failure to pay overtime, sexual harassment, violation of family and medical leave laws, and retaliation against whistleblowers. This article summarizes the law in these areas as they relate to paralegals.

## **OVERTIME PAY**

Paralegals often work long hours, but receive no overtime pay. Under both state and federal law, employers must pay their employees overtime pay (at one-and-one half times the normal hourly rate) for all hours worked over 40 in a workweek, unless an exemption applies. This rule applies to most paralegals, even those who are paid a guaranteed "salary" every week.

Law firms have tried repeatedly to count paralegals as "white-collar" workers, exempt from overtime. Most paralegals meet the minimum pay requirements (\$455 per week) to be considered exempt, and many do work that involves the use of independent judgment and discretion (also required). However, most paralegals cannot meet the other requirements of an administrative, executive or professional exemption.

If a paralegal supervises other employees or paralegals (including input relating to hiring and firing, and daily supervision), he or she may qualify as an exempt executive. Paralegals generally do not have the educational requirements to meet the "learned professional" exemption, and their work usually does not qualify for the administrative exemption.

If you are a non-supervisory paralegal and are not getting paid overtime for hours over 40 per week, you probably should consult an attorney -- outside of your employer law firm.

## **SEXUAL HARASSMENT**

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Working long hours in close quarters, often deep into the night, it is probably no surprise that paralegals sometimes find themselves the target of sexual advances and other inappropriate conduct by attorneys and other co-workers. The casebooks are filled with complaints by paralegals of sexual harassment by the lawyers for whom they work.

Sexual harassment generally takes two forms -- either quid pro quo sexual harassment, in which the terms of employment are affected by whether the employee complies with a superior's sexual requests and come-ons; or "hostile work environment" harassment, in which unwelcome severe or pervasive mistreatment is based on the employee's gender and adversely changes the terms and conditions of employment.

In a quid-pro-quo case filed this summer, a female paralegal sued her law firm, alleging she was wrongfully terminated for opposing the sexual harassment of one of the partners. The lawsuit also alleged that the partner demanded sexual favors from employees and either stated or implied that their employment was dependent on cooperation. Those who went along with it got promotions, raises and bonuses. Those who didn't were punished or terminated.

The complaint alleged,

During and after working hours, both on and off the premises and with the actual knowledge of his peers and superiors, he used and continues to use his position of power and authority over vulnerable, economically dependant and emotionally vulnerable subordinates to seduce or compel, as circumstances might warrant, intimate sexual relations of a conventional as well as deviate nature. ... Knowing full well of [the partner's] proclivities, [the law firm] simply adopted the expedient practice of enabling [the partner's] tastes by handsomely compensating injured employees in exchange for perpetual silence.

In a similar California case, the jury hit the law firm with a \$368,000 award, including \$300,000 in punitive damages, for sexually harassing a paralegal. The jury found that the law firm should have known about the sexual harassment, but did nothing to stop it.

Men and women can be victims of harassment, and sexual harassment includes same-sex harassment (e.g., men harassing men because of sex or gender). Anti-discrimination laws also protect employees against harassment based on race, age, disability, sexual orientation (in New Jersey and some states, but not Pennsylvania, except in select cities that have enacted laws protecting sexual orientation, including Philadelphia), national origin, religion and other protected statuses.

Paralegals also should know they are protected against retaliation for filing a reasonable, good faith complaint of harassment.

If a paralegal feels that he or she is being harassed, the best first step is to tell the harasser in no uncertain terms that his or her conduct is not welcome and should stop. If this does not end the harassment, then a report should be made to human resources or a senior manager of the firm. Keeping a journal and records of all wrongful conduct and communications made also is recommended.

## **MEDICAL AND MATERNITY LEAVE**

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Many paralegals are young and work during their childbearing years, requiring occasional maternity leave and child-care leave. Others are career paralegals who often work well into their 50s and 60s, where medical issues more often arise, requiring occasional prolonged leaves of absence.

Paralegals who work for a law firm with 50 or more employees within 75 miles of the employee's worksite may be eligible for family and medical leave protection under the federal Family and Medical Leave Act (FMLA), as well as New Jersey's Family Leave Act, if the paralegal works in New Jersey.

The FMLA provides employees with up to 12 weeks of unpaid leave per year for a birth or adoption, or to care for a family member's serious health condition, or if incapacitated by the employee's own serious health condition. Leave can be taken all at once or intermittently, if medically necessary (e.g., for chemo treatments or doctor's visits).

Although state and federal law do not require that the leave be paid, employers may require that the employee use accrued paid leave concurrently during the leave. Employees are eligible after 12 months of continuous employment, so long as they have worked 1,250 hours during the previous 12 months. Importantly, the FMLA (and New Jersey's law) protect against discrimination or retaliation against an employee who takes FMLA leave.

Covered employers are required to provide employees with written notice of their rights. If a paralegal encounters problems in relation to taking family or medical leave, he or she should review the employer's policy and state and federal law on the issue. The paralegal may have a legal right to the leave. These issues can be extremely complex and fact-sensitive, and new federal regulations have only complicated the issues. If in doubt, seek expert advice.

## **WHISTLEBLOWING**

On occasion, paralegals observe unlawful conduct by their employers or their employer's clients, and sometimes are even asked to take part in such unlawful conduct -- such as the destruction of evidence or the presentation of a knowingly false affidavit to a court.

Various state and federal laws provide limited protection to paralegals and other employees who "blow the whistle" on such unlawful conduct. New Jersey has one of the nation's most far-reaching whistleblower laws, the Conscientious Employee Protection Act (CEPA). In general, CEPA protects any employee who works in New Jersey from retaliation because the employee has disclosed or threatened to disclose, objected to, opposed or refused to participate in any conduct the employee reasonably and in good faith believes is fraudulent or criminal, violates a law, regulation or rule of New Jersey, or is incompatible with a clear mandate of public policy concerning public health, safety or welfare or protection of the environment.

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Pennsylvania has a much more limited whistleblower law, the Pennsylvania Whistleblower Law. The Pennsylvania law makes it unlawful to "discharge, threaten or otherwise discriminate or retaliate" against an employee in compensation or in terms of employment because the employee has made, or is about to make, a good-faith report to the employer or to an "appropriate authority" about an instance of "wrongdoing or waste."

The law also makes it unlawful to discriminate or retaliate against an employee because he or she has been requested by an appropriate authority to participate in an investigation, hearing or inquiry regarding the employer's alleged wrongdoing or waste.

If a paralegal feels that he or she is being asked to do something unethical or unlawful, he or she should oppose the conduct and refuse to participate. If any retaliation or adverse action follows, the paralegal should notify human resources or other upper management, or outside counsel, and seek protection.

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#### **ATTORNEYS MENTIONED**

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