
SURPRISE PACKAGES FROM THE JUSTICE SYSTEM VIA FEDERAL EXPRESS, UPS AND ORDINARY MAIL

M. Blen Gee, Jr.

Most business people know that a visit from a deputy sheriff with a manilla envelope in his hand means that their company is about to be served with a lawsuit. A certified letter to the company could mean the same thing. Federal law suits may be served by anyone who is not a party to the lawsuit and is at least 18 years of age. This includes private process servers and U.S. marshals. Private process servers are also sometimes used to serve lawsuits that have been filed in other states.

However, most business people, and many lawyers, do not know that there are several other legally sufficient methods of *service of process* (official delivery of a lawsuit) which may catch you by surprise. Effective October 1, 2001, lawsuits filed in North Carolina courts may be served by Airborne Express, DHL Worldwide Express, Federal Express and United Parcel Service (UPS). A delivery by any of these services should be treated the same as a certified letter or a delivery from the Sheriff's Department; it should be opened promptly to determine if it contains court documents which need to be delivered to your attorney.

Service of process in many legal proceedings may be by ordinary first-class mail. Some include:

▼ **Bankruptcy notices.** This notice informs a creditor of the deadline for filing a *proof of claim* in the bankruptcy proceeding. A proof of claim not timely filed results in the claim will being lost. Also, a lawsuit within the bankruptcy proceeding (called an *adversary proceeding*) may be officially served by regular first-class mail. The failure to recognize that such a mailing is a lawsuit and promptly respond to it could result in the entry of a judgment against your company.

▼ **Class action notices.** A class action is a form of litigation where a few named plaintiffs represent a large class of people or companies, with the entire class benefitting from any favorable result. Frequently these will have little or no impact on your company. However, occasionally a class-action may substantially benefit your company; or important rights may be lost if you fail to "opt out" of the designated class. Class action notices should be promptly reviewed and referred to counsel as appropriate.

▼ **Notice of commencement of a binding arbitration proceeding.** Binding arbitration is a private, non-judicial dispute resolution procedure

which can result in the entry of a judgment against your company. A notice of commencement of arbitration must be treated with the same seriousness as the commencement of a lawsuit.

Business practice pointer: Management should set up procedures for prompt review of documents received by certified mail, private deliver services such as FedEx and UPS and regular first-time class mail. Any communications relating to a court matter or arbitration should be promptly reviewed and, if appropriate, immediately transmitted to legal counsel.

LEGAL ISSUES IN THE PROCESS OF HIRING EMPLOYEES

F. Stephen Glass

The hiring of new employees usually begins with a job application and in employment interview, both of which can become sources of discrimination law suits against the prospective employer. Your company's job application and interview with a job applicant must **not** contain questions that might indicate that the employer is using some illegal discriminatory criteria to decide whether to hire the applicant.

Employers should NOT ask a job applicant questions about:

❑ **Race, sex, religion and national origin.** Title VII of the Civil Rights Act of 1964 prohibits job discrimination based on these criteria. An employer may inquire if the applicant is 18 years of age or older and has a legal right to work in this country either through citizenship or status as a resident alien.

❑ **Marital status, maiden name, information about the applicant's children or other dependents.**

❑ **Pregnancy.** The Pregnancy Discrimination Act of 1978 prohibits job discrimination on the basis of pregnancy and childbirth. This law applies to all phases of employment.

❑ **Age.** Employers should avoid asking questions that would lead to the discovery of an applicant's age. For example, the employer should not ask about the date of high school graduation since the answer could reveal the applicant's age. The Age Discrimination in Employment Act of 1967 prohibits job discrimination against applicants who are forty years of age or older. This law applies to employers with twenty or more employees.

❑ **Arrest records.** It is not only permissible to inquire about criminal convictions (not arrests) but necessary to protect the employer from possible claims of negligent hiring.

❑ **The existence of a disability.** The Americans with Disabilities Act of 1990 prohibits job discrimination against qualified applicants or employees who have certain disabilities. The employer may ask about an applicant's ability to perform specific job-related functions.

❑ **Military history,** unless the job requires such a background.

Employers should describe the essential functions of the job for which the applicant is interviewing. Then the employer may ask a job applicant if he or she would be able to meet the requirements of the job, such as overtime or travel, weekend or evening work; if the applicant has the skills, education, experience, licenses, training and certifications necessary to perform the job as described. Of course, the employer may ask the applicant about what colleges or training school he attended and what degrees or certificates were awarded. The employer may also require the applicant to take job-related testing to determine if the applicant can perform the essential functions of the job.

General rule: If the question does not have anything to do with the job or is not vital to determining whether the applicant has the ability to perform the duties associated with the job, the employer should refrain from asking it.

DEFENSIVE JOB APPLICATIONS AND INTERVIEWS

F. Stephen Glass

By careful preparation, an employer can use the employment application as an effective shield when a disgruntled employee or applicant files a claim against the business. The hiring phase is the best place to begin the employer's defense by using an employment application with appropriate disclaimers. Some defensive language that can be used in an employment application include:

❑ A limit to the period for which an

application is "active." By doing this, an employer can defend against discriminatory refusal-to-hire claims by persons with outdated applications.

❑ An acknowledgment by the applicant that the employment is "at will" and, once commenced, can be terminated at any time, with or without cause or notice, by either party. North Carolina is an "employment at will" state.

❑ An authorization permitting the prospective employer to request full information from applicant's former employers. This *written authorization* is important in light of statutory restrictions on the dissemination of such information and the applicant's reasonable expectation of privacy. The *written authorization* should also include a provision that releases and holds harmless the prospective employer from any liability resulting from checking with former employers.

❑ A certification by the applicant that all information in his or her job application and resume is accurate and a statement which makes it clear that the applicant can be immediately terminated if it is later learned that the applicant misrepresented information on the application or resume.

While there is no guarantee that these precautionary measures will prevent claims or law suits, they are easy to adopt in your hiring process. They could minimize the risks and reduce the likelihood of a lawsuit by a disgruntled non-hire or former employee.

Before hiring an applicant for any job, the employer should verify all information on the applicant's application or resume. The employer has a duty to make a thorough check on the applicant's background prior to hiring in order to determine not only the applicant's job qualifications, skills and experience, but also to avoid hiring a dangerous, unfit or dishonest employee.

THE DUTIES OF A CORPORATE DIRECTOR OR OFFICER

F. Stephen Glass

Certain duties are imposed by law upon the conduct of a director or officer of a business corporation. The North Carolina Business Corporation Act codifies the general rule that a corporate director or officer must carry out his or her duties:

(1) in good faith,
(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and
(3) in a manner he or she reasonably believes to be in the best interest of the corporation.

A corporate director's and officer's duty of good faith is to act in the best interest of the corporation and not in his or her own interest or in the interest of another person or organization. One should not use

his or her position as a corporate director or officer to make a personal profit. To do so could be a conflict of interest and a breach of that duty of good faith to the corporation.

A corporate officer or director cannot take the business of the business corporation for himself.

North Carolina courts have long held that directors and officers are generally not liable for mere errors of business judgment, nor for slight omissions from which a questioned loss could not have been reasonably expected. The “**business judgment rule**” protects a director or officer, with no personal interest in the transaction, from personal liability to the corporation and its shareholders, even though a corporate decision by the officer turns out to be unwise or unsuccessful. A court will not substitute its judgment for that of a *disinterested* director or officer if the director officer acted in good faith, was reasonably informed, and rationally believed the action taken was in the best interests of the corporation.

Officers and directors owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the business corporation.

Summary: Every corporate director and officer owes duties of fidelity, honesty, good faith and fair dealing to the business corporation.

More on Wages and Hours Law . . .

PAYMENT TO SEPARATED EMPLOYEES

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The Wage and Hours Act requires that employees whose employment is discontinued for any reason “*shall be paid all wages due on or before the next regular payday*” either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

When Wages Are In Dispute.

If the amount of wages is in dispute, the employer is required by the Act to pay the wages, or that part of the wages, which the employer concedes to be due without condition, within the time prescribed in the paragraph immediately above. The employee retains all remedies that the employee might otherwise be entitled to regarding any balance of wages claimed by the employee.

Acceptance of a partial payment of wages under this section by an employee does not constitute a release of the balance of the claim. Further, the Act provides that any release of the claim required by an

employer as a condition of partial payment is void.

Withholding of Employee's Wages.

An employer may withhold or divert any portion of an employee's wages when (a) The employer is required or empowered to do so by State or federal law, or (b) The employer has a *written authorization* from the employee which is signed on or before the payday for the pay period from which the deduction is to be made indicating the reason for the deduction. Two types of authorization are permitted:

(1) When the amount or rate of the proposed deduction is known and agreed upon in advance, the authorization shall specify the dollar amount or percentage of wages which shall be deducted from one or more paychecks, provided that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization; and

(2) When the amount of the proposed deduction is not known and agreed upon in advance, the authorization need not specify a dollar amount which can be deducted from one or more paychecks, provided that the employee receives advance notice of the specific amount of any proposed deduction and is given a reasonable opportunity to withdraw the authorization before the deduction is made.

TWO USEFUL CONTRACT PROVISIONS

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In North Carolina, attorneys' fees are not normally awarded for a breach of contract unless the contract language permits it. The inclusion in your contracts, invoices, and similar documents of such a provision will allow you to collect attorneys fees equal to up to 15% of the entire amount owed to you.

Contracts should also provide for the payment of interest on past due balances. In North Carolina, if a contract is silent, interest will run at the rate of 8% from the date of breach of the contract. Your collections can be substantially improved by providing for a higher interest rate in the event of default. Many commercial lenders routinely include such provisions in their loan documents and enforce them in litigation.

For example, the following two sentences could be included in all your purchase orders, invoices and similar contract documents:

A SERVICE CHARGE of one and one half percent (1½%) per month [ANNUAL PERCENTAGE RATE of eighteen percent (18%)] will be assessed upon any amount not paid

as provided above.

In the event we are required to place the collection of any amount due hereunder in the hands of an attorney, you agree to pay all charges, expenses, court costs and reasonable attorneys fees attributable to collection.

These contract provisions must to be included in the documents that are provided to the other party at the time that the contract is entered in order to be enforced.

In practice, these provisions can be very useful in the collection process and may help you reach more favorable settlements. For example, if you brought suit on a \$10,000 claim and, after a year of litigation, settled for fifty cents on the dollar, you would receive \$5,400 (half of the \$10,000 claim and half of the \$800 of accrued interest). But, if you have an attorney's fee provision in your contract and a default interest rate of 18%, then you would receive \$6,785 (half of the initial \$10,000 claim, half of the \$1,800 of accrued interest and half of the attorneys fees, which is 15% of the principal and accrued interest). The prospect of being assessed a high interest rate and attorney's fees may lead to a debtor to be more reasonable in settlement negotiations.

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