

AHA Business Radio 20170829

- Allan Hirsh: Good evening and welcome to tonight's show. My guests in the studio with me tonight are Russell Berger and Sarah Sawyer. They are attorneys with the law firm of Offit Kurman, based here in the Baltimore metropolitan area, one of the fastest growing law firms in the area, as far as I know. Welcome Sarah and Russell, thanks for being here.
- Sarah Sawyer: Thank you having us.
- Allan Hirsh: So, Sarah, what motivates you to get up in the morning and go to work?
- Sarah Sawyer: What motivates me is getting up and helping business owners, you know, see through problems and grow their businesses by overcoming legal road blocks and I like to help people. I like to help them get through tough things and be a resource for them.
- Allan Hirsh: Russell, you have been here a while ago, what motivates you to get up in the morning and go to work?
- Russell Berger: Well, I'm a problem solver. I like solving problems and legal issues that our clients have are just another set of problems to try to tackle.
- Allan Hirsh: Okay, so we are going to talk a lot about employment law during the show this evening, so the first area and we are going to talk about problems, that I think a lot of business owners, particularly small business owners don't really think about until something happens. I think you would say to them they really need to think about it before it happens. One of those areas is workplace harassment. Whoever wants to jump in tell the listeners what it encompasses and what should business owners be looking for and how to do some of the things to prevent the risks that come with workplace harassment.
- Sarah Sawyer: With workplace harassment it's something that we all hear about. We all think I will, of course, I'm not going to harass anyone, I'm a nice person, my business is a good business. This isn't a problem I have to worry about, but as your workforce grows, especially you really have to just stay on top of making sure that your employees are clear and what your policies are about harassment, what the possible consequences are and what the behavior that constitutes harassment really is. In order to do that you really have to make sure that regularly you are communicating with your employees regarding zero tolerance for that type of behavior and really keeping that atmosphere of zero harassment, zero tolerance keeping that through as your business grows and as you accumulate more employees and really checking in with your employees about those policies. I know there is a lot of questions right now and I don't know if any of the listeners have been keeping track of what's going on with the Department of Justice and with Title VII issues right now and sexual orientation, but I know that's a big issue that I see a lot of my clients raise where they say is that covered, is it noncovered and the answers is, well that's ever developing just like any area of law, I will give you the good legal answer which is, well it depends, but good policy that I always advise is, well harassment of any kind, any kind of workplace bullying, you shouldn't tolerate it, whether it is covered by Title VII or not.

Allan Hirsh: What is Title VII. For those who are listening that don't know what it is, like me.

Sarah Sawyer: Well...Title VII is law that all of this discrimination, workplace discrimination, harassment fall under, its regulated through the EEOC federally and then also there are state laws that accompany it and it covers, you know, we are familiar with, you know, race, gender, religion, orientation, or...

Allan Hirsh: Sexual, which can, so there can be sexual harassment on the job and all kinds of harassment is that covered by that as well?

Sarah Sawyer: Yes, sexual harassment is covered, where...its starting to be confusing as people are unsure if sexual orientation itself is covered, but whether its covered or not there is still the affects of gender bias and sometimes it gets looped in with that and its any kind of behavior that, you know, I always think bullying, I think, you know making people uncomfortable and it can't... its more than just slight discomfort or little incidents, its more of a bigger course of conduct.

Allan Hirsh: What should a business owner do to communicate properly with his employees to make sure they understand what is tolerable and what's not tolerable and if an event that does occur, how to deal with it?

Sarah Sawyer: The best way to do that is by workplace trainings, handbooks, set policies, being able set up a chain in command of who to go to, making sure that employees know if something happens that they feel uncomfortable with or that they want to report, they know who to go to, that they know that information is going to be kept confidential that, you know, the business owner is not going to go and tell the person that they will be able to come forth and bring that information. I tell my clients to really make sure that their handbooks and their policies are constantly being revised and to accommodate a growing workforce and policy changes. A good option is as I mentioned also the work place trainings to really go through what constitutes harassment, what's protected, what's not and what the company's policies are.

Russell Berger: To piggyback on that, there are two general forms of harassment, or at least sexual harassment, there is quid pro quo, which is I'm going to fire you or I'm not going to give you a promotion unless you engage in a relationship with me, that's pretty blatantly unlawful and there is no ambiguity there for the most part, but people still do it because they are not concerned about the consequences. The more gray area comes up with respect to a hostile work environment where people are making comments and I think I'm joking this person is being too sensitive and those types of situations or where you get into a gray area as to whether something is harassment or not, so one of the reasons we do the work place trainings and we try to delineate these things in an employee handbook is so that all employees at least are informed as to where that line is being drawn and from a business owner's perspective there is no reason to put up with any of it, you want to draw the line in a place that is far on the safe side.

Allan Hirsh: If an event occurs or there is an accusation, let me put it that way better than event, or a situation has occurred, how should business owners and businesses deal with that with their employees.

Russell Berger: Well, I think the first thing you would typically do is, you want to investigate. You get a complaint, you should take it seriously. If you don't take it seriously, you could be held liable for retaliation and you can take a complaint that doesn't amount to anything and you can turn it into a problem by not taking it seriously so, 1. You want to take it seriously; number 2. You want to conduct an investigation and you want to try to do that as confidentially as possible, often times attorneys are brought in at that stage to help conduct the investigation, as a lawyer we come in, our work is work product, somebody who sues you can't get it, our conclusions, our opinions, our advice to the client is privileged so the other side can't see that, whereas if you have any HR person who conducts the investigation all those documents are discoverable. We conduct an investigation to figure out what the facts are and then based on the facts there could be any number of remedies sometimes it's a warning, sometimes it's a suspension, sometimes its re-organizing the company, so that the victim doesn't have to report to the person who did the harassment before and of course sometimes the proper remedy is terminating the employee who engaged in the harassing behavior.

Allan Hirsh: What goes on... and again you talked about a confidentiality within this investigation. If you are the one you perceive to be the victim. Besides reporting it what are some of the other rights you might have during this investigation or to protect yourself from it ongoing even while it is being investigated.

Russell Berger: The confidentiality isn't a right and the way we would write a handbook policy is say we will do our best to keep it as confidential as possible, but if you have to start asking the people questions and conduct an investigation, it is inherently not 100 percent confidential.

Allan Hirsh: You have to ask people who might have been witnesses and that kind of thing to it.

Russell Berger: Exactly, so that's one piece of it, but the Title VII that Sarah mentioned earlier as well as all the state laws and frankly this is true of a whole bunch of other laws in other areas where an employee might have a claim, but generally speaking, they all contain an anti-retaliation provision, which is if you make a legitimate complaint, whether you are right or wrong, you are protected because the law wants to encourage the employee to make those types of complaints.

Allan Hirsh: Well, thank you for that. We do have to go to our first commercial break and when we come back I will continue the conversation with Russell Berger and Sarah Sawyer on employment law. Later in the show, I have the AHA Business Trivia Contest. I am Allan Hirsh of Allan Hirsh Advisors. This is AHA Business Radio and CBS Sports Radio 1300 a.m.

Commercial break from 11:22 to 14:38

Allan Hirsh: Welcome back to the show. I am in the studio with Russell Berger and Sarah Sawyer. They are attorneys at Offit Kurman, attorneys at law specializing in employment law. If you have any questions or comments, please give us a call. We predominantly talk in this show about from a business owner's perspective, but if you are an employee and have any questions about any things that we talk about, please give us a call. They will try to answer them. Thank you out there again, 481-1300, that is 410-481-1300. We

talked in the first session about harassment, another major issue that businesses deal with is the issue of disabilities and what are their responsibilities for, and I guess you can both sort of.... and I don't know the technical terms so if someone out there thinks I have used the wrong term, I apologize, but there are both mental and physical disabilities.

Russell Berger:

Correct.

Allan Hirsh:

What are the obligations of a business in dealing with employees and/or potential employees when it comes to people with disabilities?

Russell Berger:

Assuming you are covered by the applicable laws, and again there is federal law, there is state law, in some local jurisdictions, there is additional laws...

Allan Hirsh:

Sometimes they contradict each other I am sure.

Russell Berger:

While at least in this realm, the federal law sets the baseline and then the state laws and the local laws just add on top of it.

Allan Hirsh:

Okay.

Russell Berger:

Every employee in this country has certain obligations and then depending on where you are you might have more and more and more obligations with respect to employees with disabilities. Generally speaking, if you are an employer and you have an employee with a disability and that could be, as you mentioned earlier Allen, it could be a physical impairment, it is a mental impairment, the way the law reads it is physical or mental impairment that substantially limits at least one major life activity and in 2017 the courts have interpreted that to really be a broad definition of disability. Lots of things are going to constitute a disability under this law, which is then going to trigger the employer's obligation to engage in what is called the interactive process. The interactive process is kind of like it sounds it is a process between the employer and the employee to go back and forth and basically to try to find an accommodation that will permit the employee to perform the job and complete the job as they otherwise would absent the disability.

Allan Hirsh:

The question I have here is you are talking as if the employee is already there.

Russell Berger:

Right.

Allan Hirsh:

But some of the biggest problems in as I understand it as potential problems for an employer is the fact what are the requirements about hiring someone with a disability versus someone that doesn't have a disability because if you've already hired somebody, you've already taken the position that you are going to try to accommodate them and you have to accommodate them, but where does that fall in when you are looking for employees?

Russell Berger:

Certainly, you can't have someone in, you can't interview them; you look at their resume, they look like a good candidate, you bring them in, and they are sitting across the table from you while you are interviewing them, and they have some apparent

disability, you can't say I don't want to deal with you, go home. The law applies to job applicants as well, so which brings up another question in the interviewing process, you shouldn't talk about a disability, you shouldn't ask those questions, you shouldn't do things that will cause you as an employer to obtain information which someone who doesn't get a job could turn around and say, well I told you I had this disability and then you didn't hire me it must be because I told you I had this disability and that is unlawful, and so I'm going to sue you. You don't want to ask those questions. I think the type of question that is permissible and often times you will see this on a job application is that you provide the job description, they know what the job is, are you able to perform the essential functions of this job with or without a reasonable accommodation, and if the answer to that question is yes, then they are eligible for the job, and certainly there is no ability to screen out disabled applicants.

Allan Hirsh: But what if they answer yes?

Russell Berger: Yes, they...

Allan Hirsh: No, they are not able to carry out the...

Russell Berger: The essential functions?

Allan Hirsh: ...essential functions?

Russell Berger: If they can't do the job they can't do the job.

Allan Hirsh: Well, but if they... but I would look at it from the other side if I were... and I had situation which I can talk about in a minute, but before I do that just want to remind everybody I am in the studio with Russell Berger and Sarah Sawyer. We are talking about employment issues, particularly right now about disabilities. If you have any questions or comments, give us a call 410-481-1300. I had an office that was on the second floor of a building that didn't have an elevator. It really frustrated me because the jobs I needed done could've been accommodated by someone, but they couldn't get into the building.

Russell Berger: That's terrible! The landlord might have had a problem.

Allan Hirsh: Well, it's a historical building. It was a historical building, and the worst part of it was, in the last few months, I was the one that had to crawl up and down the steps because I had to have some surgery on my foot. But to me, that's my job trying to, wanting to help making it available to people, and I inherited, by buying the business that was the place where they worked, so he didn't have to... under the... and that's some strange things in the law, I guess, with historical buildings.

Russell Berger: Right, I mean that's a unique situation because the ordinary situation is, if there is an accommodation that's reasonable, that can be made for the employee, then it needs to be made and that's why you have this interactive process to kind of figure out exactly what the disability is, how does it affect the employee or applicant in performing the essential functions of the job and what needs to be done to alleviate the disability at least in terms to the extent it's an obstacle to completing the job functions.

Allan Hirsh: How far is an employer required to go in order to make sure that there's an accommodation? Is there some limits to what they have to do or what?

Russell Berger: Sure. The test itself, it's called a reasonable accommodation. The test is one of reasonableness and employers don't have to go so far that they create what the law calls an undue hardship. On the one hand, you have to make an accommodation that's reasonable and you don't have to do something that creates an undue hardship on the business. Those are incredible vague, subjective terms and you get...

Allan Hirsh: Yes, that's why as a former employer, so what you know, in advice I guess it depends on the individual situations, but what would you advise employers to think about in trying to make sure that they honor the law and make a reasonable accommodation.

Russell Berger: Well, I think the most important thing is that the law demands that you participate in this back and forth process with the employee and you try to work to a solution and to some extent, you ask the employee, okay, what's going to work for you? If you have a bad back so you need a special chair, or someone has carpal tunnel syndrome and they need a special keyboard, that's going to be a reasonable accommodation, there's no undue hardship in any of that. If someone says I have an illness, or I have some other malady and I have no idea how long I'm going to be out of work, but I can't work for some indefinite amount of time, most courts, I think all courts have considered the indefinite leave question, have ruled that that's an undue hardship. Those are kind of bright lines on the ends but there's still always going to be some gray area in between.

Allan Hirsh: Okay. What do you tell your clients, and again, it's about trying to make sure they understand the issues and try to accommodate the best they can. Is that really what I'm hearing from you all?

Russell Berger: Right, engage in the process and there's forms that employers should be using to request information from the employees and then it's an appropriate goal to try to figure out what can be done that will allow this person to do the job and then it's a question of okay, this is what's needed for this person to be able to do this job. What's that going to cost? I don't just mean in terms of dollars but what does that cost this company and where does that fall in the spectrum of, it's okay, it's a reasonable accommodation versus this is too far, this is going to create an undue hardship.

Allan Hirsh: Is there anything that creates an impact on other employees, that it affects the accommodation of the one person that has the disability?

Russell Berger: Sure, I mean somebody might say they need an accommodation, they need to work on a different shift. And now you've got to restructure or the request would be to restructure schedules or swap assignments and that certainly can have those effects. I mean I think if you have an employee that needs to switch into a different job because they have a disability, within the company, you're not going to fire somebody to make room for them but if there's room in that department and you can...

Allan Hirsh: That's a reasonable accommodation?

Russell Berger: Right. I mean all of this again is going to be very fact specific and on a sliding scale, but certainly that's I think a good general rule of thumb.

Allan Hirsh: Okay. Well Russell thank you for the discussion on disability issues. We do need to go to our next commercial break and as we do we will have a traffic update and when I come back I will continue the conversation with Russell Berger and Sarah Sawyer of Offit Kurman. I'm Alan Hirsh and this is AHA Business Radio on CBS Sports Radio 1300 am.

Commercial Break from 25.21 to 29.40

Allan Hirsh: This segment I will be talking with Russell Berger and Sarah Sawyer of Offit Kurman. We're going to talk about wage and hourly issues. They are very important because they can create substantial issues for businesses if they don't do it right. What's the right way to do wage and hour issues, and I know there was an attempt, I don't know if they ever went through, some attempts last year to change the formula, so Sarah why don't you start it and we'll go from there.

Sarah Sawyer: Yeah, so wage and hour issues are complex. They encompass a variety of issues including properly classifying your employees, timekeeping and properly calculating your overtime rate. There are a lot of different things to examine here. When you ask what's the right way to do it, it really is to examine your work force, examine job the descriptions, make sure you're classifying employees properly, to make sure...to look at your pay structure, your payroll, look at whether you're paying them properly.

Allan Hirsh: What do you mean...there are some people out there, particularly those who are new to business, what do you mean by classifying employees?

Sarah Sawyer: When you...you classify employees as exempt or nonexempt, that's what's important for, at least for the wage and hour laws, the Fair Labor Standard Acts and the related state laws that accompany it. You have to decide if your employee is exempt from the overtime laws or from the wage and hour laws or are nonexempt, and if they are nonexempt then you're going to have to make sure that you're paying them proper overtime, that you're complying with...

Allan Hirsh: Basic definition, I know there is some fine points in it, what's the basic definition of an exempt employee?

Sarah Sawyer: Exempt employees tend to be managers, managerial level, people that make over a certain amount of salary, the people in your workforce that do outside sales work. There is a list of... a plethora of people that are in that exempt category, but the problem that employers often face with classifying these employees is that obviously when I spout out these terms, manager, or you know, for people that are in sales, outside sales or certain terms, people have a certain idea in their head of who those people are, but that doesn't mean that that necessarily, that they are actually performing their...

Allan Hirsh: Because those...

Sarah Sawyer: ...duties that that doesn't make sense.

Allan Hirsh: Right...and they really...they are defined within the laws, as I understand it, or within the guidelines and the regulations so that a business has some idea of what really classifies as an exempt employee.

Sarah Sawyer: Yeah and that requires a deeper dive where you can't just say well I called him a manager. They are a manager in my eyes, they are a manager under the law, and it's not that simple. Of course nothing in law ever is, as we're learning from this show tonight, but its...so it really does involve a deeper dive and I really like to help the clients where it is not only just...we get in there and we see all right what are these people actually doing, but also to look at pay practices. You can really find, I think, really help in two ways, you can help make sure that people are classified properly, but also that you're managing your workforce in the most efficient way possible and making sure that you...if you have exempt and nonexempt employees that it's very clear how you're paying them.

Allan Hirsh: So an exempt employee, as I understand it, please correct me if I'm wrong, please I am a lot more than I'd like to think, that an exempt employee is a we quote business where we call a salaried employee not subject to overtime and wage and hour laws, that's an exempt employee. Am I correct or...?

Russell Berger: Kind of.

Allan Hirsh: Okay.

Russell Berger: Kind of.

Allan Hirsh: Okay. So before you answer, just to remind everybody, we're talking about wage and hour laws, exempt-nonexempt employees. If you have any questions, give us a call at 410-481-1300.

Russell Berger: So there is a whole laundry list of exemptions. Now, Sarah kind of hit on the main thrust of it which is if you're a manager, if you're an executive, if you're an outside sales person, if you're a professional, you're going to be exempt provided in most cases you satisfy a minimum salary threshold as well. Depending on the test, it can mean different things with respect to job duties.

Allan Hirsh: Yeah, but my point was if you qualify as an exempt employee, you can be a salaried employee and not, am I correct, and not...that would certainly be subject to the wage and hourly part of the laws.

Russell Berger: Right, if you satisfy the job duties and you get paid a certain minimum...

Allan Hirsh: ...salary.

Russell Berger: ...salary per week, then you would satisfy an exemption. You wouldn't be... the employer wouldn't have an obligation to track your time and...

Allan Hirsh: But you have to do both, its just not being paid the salary, but its also making sure the job is properly defined.

Russell Berger: Right, and in fact there's a few exemptions that focus on the job duties alone and don't address the salary. It doesn't, you know, outside sales for example those people can be paid commissions only, but they still have to have the right job duties. So I'd think if it is the job duties come first, then we'll check the salary.

Allan Hirsh: Yeah, I would... having been a business owner, I would agree with you. You have to figure out whether they are exempt or not, and then figure out if they are making enough under the minimum, how you deal with it.

Russell Berger: Right, yeah, it certainly starts with the job duties, gets the salary, and then if you run into a problem there, then you turn to proper...not a problem, but you determine they're nonexempt, then you look at timekeeping and overtime calculations.

Allan Hirsh: So, let's talk a little bit. What are the requirements now for the nonexempt employees? Because this is where businesses get in trouble, one, by wrong classification, but the second by not following, as I understand it, following the laws and requirements of dealing with nonexempt employees?

Russell Berger: Well, I think the requirement is simple to state, and its if you're a nonexempt employee, if you're working more than 40 hours in a week, you're owed time-and-a-half of your regular rate. Basically, if you're an employer, you've got a nonexempt employee, you got to pay him time-and-a-half for overtime. Now, what that means is going to be very, very detailed given the circumstances.

Allan Hirsh: What kind of details are you talking about that help to summon the circumstances involved?

Russell Berger: One question would be what constitutes an hour of work, and what's work time, what's compensable, what's not. For example, a 30-minute meal break is not compensable time. It doesn't count towards getting towards 40. Whereas a 15-minute smoke break is compensable time and you have to pay your employees for that ao, that would be one question in terms of recording time. You often see problems or concerns arise regarding rounding. Someone punches a time clock, it rounds down to the nearest quarter hour, it rounds up...how the rounding process works is no surprise here. There's laws about how rounding would work, therefore, you have all these issues about what is actually time worked. Then once you figure that out, you then turn to the next issue which is how do you calculate your proper overtime rate. For example, if you pay someone 10 bucks an hour, they work the 41st hour, it gets paid a time-and-a-half, that's 15 bucks an hour, that's pretty straightforward and simple, but then what if you pay him a commission and how does that get factored in, and there is actually an algebraic formula for how that takes place which I don't know if that plays too well on the radio.

Allan Hirsh: No, we don't have to, but, but commissions have to be taken into account. Any type of compensation, paid compensation they receive has to be taken into account and when calculating the hours and when overtime occurs.

Russell Berger: Compensation for hours worked or services performed, what wouldn't have to be taken into consideration is for example a Christmas bonus. That doesn't have to get factored into the overtime calculation, but if you're a sales person, you're nonexempt, you win a prize because the company runs, a you know, a promotion for their top sales people. In theory that's supposed to be factored into the overtime calculation as well.

Allan Hirsh: The other thing is, if you work 45 hours this week and 35 hours next week, what's...how does that come into the hourly wage?

Sarah Sawyer: It's...so the way that it's calculated, it's by week. You can't...if you're working 40 one week and then you're working...a better example is, if you're doing 45 this week and then you're working 35 next week, well can I say, well you know, when we average them together, they're working 40 hours a week. Unfortunately, for business owners fortunately depending on how you look at it, that's not the way that, that is calculated.

Allan Hirsh: That's why I asked that question, that same number, so, as I understand it, is not added one and even if you're pay period is two weeks, you still have to calculate it on a weekly basis...

Sarah Sawyer: On a weekly basis yes.

Allan Hirsh: Okay, great. We need to go to our next commercial break and when we come back, I will have the AHA Business Trivia contest and we will continue my discussion with Russell Berger and Sarah Sawyer, and we will be talking about, when we come back spend some time talking about, the right way and wrong ways maybe of terminating employees, so I'm Allan Hirsh of Allan Hirsh Advisors, and this is AHA Business Radio on CBS Sports Radio 1300 a.m.

Commercial break from 40:00 to 43:40

Allan Hirsh: Welcome back. Tonight's trivia question is Starbucks Coffee was named after a character in which famous novel? Again, Starbucks Coffee was named after a character in which famous novel? A caller with the correct answer at 410-481-1300 will receive a gift certificate to the Capital Grill Downtown Baltimore one of my favorite restaurants again. Give us a call 410-481-1300 if you know which character, which novel the name Starbucks came from for the coffee stores. While we wait for the callers, I am talking to Russell Berger and Sarah Sawyer. They are attorneys at Offit Kurman and we have been talking about employment law. And we have covered a number of things and one of the things that I want to talk... that we want to talk about in the last segment is the ways... what do you need to do in order to properly terminate employees, so what are some of the things you should be doing as an employer to properly terminate an employee if you need to and from an employee point of view what should they be looking for to make sure their rights are protected, if they have any rights, if they are terminated.

Sarah Sawyer: The most likely time for a lawsuit in an employee lifecycle is at termination. You really want to get out in front of that and start documenting things beforehand, start really putting policies in place and really get ahead of the actual termination phase.

Allan Hirsh: Okay keep going. Because I will get to the caller in a second.

Sarah Sawyer: With the way that obviously when someone's terminated no one is happy, may be the employer is happy, you get rid of the person or vice versa, but most of the time it can be a contentious situation and so really what employers and employees want to be doing leading up to that moment, which they would obviously won't always know when that moment is coming, but documenting, making sure that if there is any performance issues, documenting those performance issues, documenting how they are handled, making sure that there is a history of interactions, if there is a complaint by the employee that is documented and how that was handled is documented.

Allan Hirsh: Okay let us come back to this, I do want to get to Dave on the line. Dave?

Dave: Hey, how you are doing?

Allan Hirsh: I am doing fine. Thanks for listening.

Dave: Yeah, I am enjoying it.

Allan Hirsh: Well I thank you very much for listening and calling in. Starbucks Coffee was named after a character in which famous novel?

Dave: Moby Dick.

Allan Hirsh: You are absolutely correct and it was actually the name of the ship's first mate, I do not know if you knew that but.

Dave: I think in that part of my memory I remembered that, yeah.

Allan Hirsh: Well, thank you for calling in, if you have a question for the guests, let me know; if not, I will put you on hold and Jo will get all your information so we can mail you out that gift certificate.

Dave: Thanks, I don't think I have any questions, but I am appreciating the dialogue.

Allan Hirsh: Well, thank you very much for listening and for calling. We were talking about the documentation that employers should be using to justify if there is a termination.

Sarah Sawyer: The employee should know the termination is coming. If they are having problems with an employee, you want to make sure that those are made known to the employee that there is evaluations done, that you are keeping a good record, keeping it in the personnel file, keeping a good record of meetings, of conversations with the employee about their performance issues, and you want to make sure that you are implementing possible plans for trying... we call it a performance improvement plan, which would tell the employee, well, here is where the shortcomings are, here is the issues that we are having and here is what you need to remedy them to kind of put them on notice that they are not performing properly for whatever reason it might be, not hitting goals, not performing their job duties properly, and to put them on notice of what they need to do differently, that way if anything... a lot of times when an employee is terminated is when the harassment cases that we talked about earlier, when the wage and hour

lawsuits come, its when all of those things start to pop up because employees are often disgruntled or yeah, it's a time when those things come to light.

Allan Hirsh: Yeah, well from my perspective as a business owner and been in the situation one of the things business owners do which I wish I knew what I knew now when I was running businesses but is to a phrase that a number of my guests have used when I have talked about... asked them what are some of the decisions they have made that they wish they had not made and learned from is to hire slowly and fire quickly and I know most of us don't... as a business owner, it is not something we want to do, we do not want to affect an employee's career, but by keeping people longer than they need to be there, they are creating more problems for the business and you are creating problems, as I would think, with yourself, and you can answer this, by tolerating it for a long period of time, you might put yourself in jeopardy of actually being able to fire someone for those issues, am I correct on that?

Sarah Sawyer: I think you have to find a balance between making sure that you are protecting yourself and documenting as I had mentioned but also not allowing a toxic employee to harm your work environment or to... their poor performance to really influence your business for a long time and you can be more effective in your termination and in those meetings when you go to terminate someone if you have been properly keeping tabs and paying attention. What you don't want to be is in a situation where all of a sudden you've have kind of let something fester and you've had a bad employee and they've been there for a long time and you are just ignoring the problem until you just can't take it anymore, you don't want to be in that situation. You want to be in a situation where you are being proactive and you are documenting that poor performance and though it is something that is going to occupy your time and take some effort, it will pay off in the long run when you are able to effectively terminate someone and really cover all your bases and not have to have someone... you don't want to....

Allan Hirsh: I understand. , Did you want to say something?

Russell Berger: Yeah, even worse when you allow an employee who is a poor performing employee to hang around for a while you might not be documenting it as clearly and you might be giving raises because you give everyone in the company an annual raise and generally speaking most employees are hourly employees, which means you can hire or fire them at any time for any reason as long as it is not unlawful, but when you don't document and when you give people raises and you treat them like they are at least performing at an average or satisfactory level and then they get terminated, then you leave yourself vulnerable to a claim of discrimination or harassment instead of building the case and saying, look, you are just not a good employee that is why I got rid of you and here is my evidence of it.

Allan Hirsh: Yeah, one of the things that I talked to my clients about over the last few years is too much of what we do in evaluating employees from my point of view is subjective, it is an opinion and nothing is based on fact. When I worked with them and tell me if I am doing this, I ask them to try to set up what I called smart plans for employees giving those specific goals, making sure they are measurable, achievable, who is doing them in the timeframe, so that you can actually evaluate them on achieving their goals and now

you have an objective evaluation, which is much better documentation I would think than what so often happens when it is a subjective evaluation.

Russell Berger: You are surely speaking my language when you get into measurables and metrics and just data, you know, I can look at baseball statistics all night, so I think, you know, we don't have that in the workforce in the same way you do in sports, but I think what you are talking about makes a lot of sense is you are building metrics and obviously the metrics that, you know, help your clients build are going to be things that advance the business interests.

Allan Hirsh: Well to me, for example, just a simple thing like a bookkeeper where you want your internal financial statements by the 15th of the month every month, you hire a new bookkeeper, you set up the timeframe, you give him three months to learn the systems and deliver them on the 15th of every month. That is a specific goal, it is measurable, it should be attainable, who is doing it, in what timeframe, and you can evaluate it, you can evaluate at three months down the road, four months down the road, a year and a half down the road, if that bookkeeper is doing it for a while and then stops doing it, you now have a metric, which is objective evaluation of their performance of their job, which you should be evaluating on a periodic and reevaluating as things go forward, but it gives you... most job descriptions are to me are viewed subjectively rather than setting some real objectives with employees.

Russell Berger: Exactly what you are talking about, because then if that bookkeeper doesn't get it in on time there is a note in the file.

Allan Hirsh: Right.

Russell Berger: And if it happens the second time, there is another note, and then the third time you terminate the employee.

Allan Hirsh: Absolutely and that's something they can't argue with.

Russell Berger: Right, there is evidence.

Allan Hirsh: Right, anyway, we are out of time, so I want to thank you. Russell and Sarah thank you for being here. How can any of the listeners out there reach you?

Sarah Sawyer: I can be reached by email ssawyer S-S-A-W-Y-E-R @offitkurman.com and also by phone 410-209-6425.

Allan Hirsh: Russell?

Russell Berger: My phone number is 410-209-6449. My email is rberger@offitkurman.com, and our firm's website is www.offitkurman.com.

Allan Hirsh: Well, thank you both for being here. I want to thank my producer, Joe LaCroy, for everything he does. It doesn't happen unless he is here. Please join me next Tuesday at 6:00 p.m. when my guests will be Angie Barnett. She is the President of the Better Business Bureau of Baltimore and they are celebrating their 100th anniversary in the

next few weeks, so we are going to be talking about the Better Business Bureau. I am Allan Hirsh of Allan Hirsh Advisers. To reach me call 443-977-4500 or visit my website allanhirshadvisors.com. You can also listen to all the past shows, the podcasts at ahabusinessradio.com. This has been AHA Business Radio and CBS Sports Radio at 1300 a.m.

Commercial break from 55:25 to End