



DONAHUE, TUCKER & CIANDELLA

## A Professional Limited Liability Company

### Exeter Office:

225 Water Street,  
Exeter, NH 03833  
(603) 778-0686

### Portsmouth Office:

Kearsarge House,  
104 Congress St., suite 304  
Portsmouth, NH 03801  
(603) 766-1686



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## Employment Contracts

The use of employment contracts for key employees in your business can provide important benefits. With the use of an employment contract, the employer can set the employee's responsibilities, benefits, grounds for termination, duration of employment, limit the employee's ability to compete with your business, protect client lists as well as set up a method for resolving disputes with the employee.

The use of an employment contract can protect you from the unexpected and sudden departure of an employee by requiring the employee to give advance notice of leaving, allowing your busi-

ness to find and train a replacement. Employment contracts can also be used to protect confidential information and trade secrets as well as restrict the employee's future competition with your business. Employment contracts also provide an employer with greater control over the employee by



setting standards of performance and grounds for termination. Employment contracts are not for every business. Disadvantages include binding your business to a set term of employment for the employee as well as restricting your ability to make unilateral decisions. Employment contracts, however, are worth considering for key employees in your business.

## Benefits of A Limited Liability Company

What form is your business? Sole proprietorship, partnership, association, corporation? There are many different forms to choose from in operating a business. The form you choose will have consequences affecting taxes, operations,

overhead expenses and liability issues. Existing businesses and start-up businesses should consider the relatively new business form of a Limited Liability Company ("LLC"). An LLC can be formed at the time a business is started and may

also be used by an existing business by what is known as a "conversion". Conversion allows an existing sole proprietor, partnership, or corporation/association/partnership to change its business form to an LLC.

## Limited Liability Companies continued...



What are the benefits of an LLC? In selecting the best business form, certain facts should always be considered: liability, tax regimens, simplicity, flexibility and cost. An LLC offers benefits in all these areas. Sole proprietors have unlimited personal liability while an LLC offers a liability shield to a member's personal assets when the claim is based on the acts of employees and other members. A multi-member LLC offers protection

to the organization's business assets from personal claims made against members of the LLC. In addition, the cost of forming and administering an LLC is normally less than a corporation. The basic legal rules governing an LLC are simpler and easier to understand than those governing corporations. The rules governing LLCs also provide for greater flexibility in structuring equity investments and profit-sharing arrangements as well as

providing for easier resolutions to disputes among owners when compared to professional corporations.

Although not for every business, an LLC offers another choice entity form for businesses.



## Sexual Harassment—An Ounce of Prevention



Implementing a non-harassment policy for your Business is an important preventative measure in protecting yourself and your Business from future possible harassment claims.

Prevention is the only sure-fire way to ensure no liability, since any tangible, "adverse employment action" (i.e. termination, reduction in pay, demotion) flowing from harassment results in automatic liability for an employer. In short, you should ensure that your Business exercises "reasonable care" promptly to prevent and correct any sexually harassing behavior. If an employer does so and an employee unreasonably fails to take advantage of those preventative or corrective opportunities, an employer will not be liable for the harassment if there has been no tangible, adverse employment action.

Should a claim be made against your Business, your ability to demonstrate efforts at prevention (i.e. non-harassment pol-

icy, training) and response (i.e. appropriately handling a complaint) are crucial to your defense.

The following is a preventative plan designed to prevent sexual harassment claims, document those efforts, maximize the likelihood of an effective response to a complaint and ensure the ability of your Business to assert all affirmative defenses permitted by law.

First, implement a proper, written non-harassment policy. If you already have one in place, make sure legal counsel has reviewed the policy. Certain key elements must be included in the policy in order to take advantage of it in a defense. These include a non-retaliation provision, examples of potential harassing conduct, the name of a person to make complaints to (including an alternate, should the first person be the subject of the complaint).

Ensure that your supervisors are aware of their responsibilities under the non-harassment policy and understand that compliance with the policy is part of

their job responsibilities. Identify and document whom you consider a supervisor. The U.S. Supreme Court has held that an employer is liable when a "supervisor" harasses an employee over whom the supervisor has immediate or successively higher authority. Include and document as a qualification for every supervisory position a "commitment to equal opportunity."

Ensure that all employees are given a copy of the non-harassment policy. New hires should be given a copy at the time of hire. Re-distribute the policy on an annual basis. When distributing the harassment policy, you should obtain a signed receipt from the employee acknowledging receipt, documenting its distribution. An updated receipt should be obtained each time it is distributed and should be kept in the employee's personnel file.

Provide and document appropriate training to supervisors and non-supervisory employ-

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*"Prevention is the only sure-fire way to ensure no liability..."*

## Sexual Harassment continued...

ees on sexual harassment prevention. The type of training will be different for supervisors than for non-supervisors. Non-supervisory training will include an overview of the policy, examples of harassing behavior and appropriate ways to handle the behavior. Such training will play a role in showing you have taken reasonable steps to prevent sexually harassing behavior.

Training of supervisors plays an important role in your preventative strategy. In 1998, the U.S. Supreme Court issued two decisions establishing standards for determining employer liability for sexual harassment committed by supervisors. Both cases au-

thorized the imposition of automatic employer liability where a supervisor engages in sexual misconduct and directly misuses his or her authority to discharge, demote or otherwise impose a tangible "adverse employment action." However, where a supervisor's sexually harassing misconduct does not cause such tangible job related harm to the employee, the employer can avoid liability or reduce damages if the employer proves, as an affirmative defense, "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of

any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."

Providing training promotes your ability to take advantage of this defense as well as increases the likelihood that the supervisor will not engage in the unlawful conduct in the first place. All supervisors should be required to attend such training and all training of employees should be documented.

Following the above outline can help prevent claims and reduce the risk that you and your Business may be found liable for harassment in the workplace.



## Elements of a personnel file

Keeping comprehensive and accurate personnel files on your employees can help prevent costly problems and make it easier to address those that develop. However, not every record relating to an employee belongs in his or her file. The following is a breakdown of some of the more typical records an employer will come across and where they belong. A personnel file should contain an employee's job description, job application, offers of employment, employment contract, performance evaluations, emergency contact information, complaints and/or commendations, IRS W-4, signed acknowledgment of receipt of employee handbook, continuing education attendance records, warnings and disciplinary notices and documents relating to an employee's termination.

Other documents, however, legally must be kept separate. An employee's medical records, whether relating to the ADA, FMLA or worker's compensation, must be kept separate from the personnel file. Form I-9, verifying you have checked that an employee is authorized to



work in the U.S., should be kept separately from the personnel file. Keep them altogether in one

folder. Records relating to discrimination charges, confidential



references and wage garnishments are other examples of records that must be kept separate from the personnel file. Following the above, as well as keeping your employee records in a secure location and doing periodic reviews of their contents, will put you well on your way to keeping your personnel files in order.

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For more information contact one of our attorneys in our business practice group:

### Locations:

#### Exeter Office-

225 Water Street,  
Exeter, NH 03833  
(603) 778-0686



Attorney **Lizabeth M. MacDonald**  
Email: lmacdonald@dtclawyers.com  
Tele: (603)778-0686 Ext. 540



Attorney **Douglas M. Mansfield**  
Email: dmansfield@dtclawyers.com  
Tele: (603)778-0686 Ext. 512

#### Portsmouth Office-

Kearsarge House,  
104 Congress St.,  
Portsmouth, NH  
03801  
(603) 766-1686



Attorney **Michael J. Donahue**  
Email: mdonahue@dtclawyers.com  
Tele: (603)778-0686 Ext. 501



Attorney **Katherine B. Miller**  
Email: kmiller@dtclawyers.com  
Tele:(603)778-0686 Ext. 509



Attorney **Denise A. Poulos**  
Email: dpoulos@dtclawyers.com  
Tele: (603)766-1686

Paralegal **Elizabeth A. Wiedmann**  
Email: ewiedmann@dtclawyers.com  
Tele: (603) 778-0686 Ext. 517

We're on the web, at  
[www.dtclawyers.com](http://www.dtclawyers.com)



Established in 1985, Donahue, Tucker & Ciandella, PLLC is one of New Hampshire's leading law firms, with offices in Exeter and Portsmouth. We are a full-service firm with our lawyers offering personalized representation to small businesses, large institutions and individuals. We represent and advise our clients in the areas which include general business and commercial law, municipal, development and real estate law, telecommunications, utility and internet law, employment and labor law, family law, environmental law, appellate, litigation, bankruptcy, and probate/estate planning.

Our attorneys provide affordable, quality legal services and personal attention to small and large businesses, agencies, boards, municipalities and individuals. Our focus on the client has enabled our firm to provide general counsel services, as well as, special representation on specific matters to all of our clients. It allows us to be trusted counselors and advisors as well as advocates.

While situated on New Hampshire's seacoast, our clients come from throughout New England. We represent many firms and individuals relocating to New Hampshire from across the nation because of our state's favorable business climate and quality of life.

The materials contained in this newsletter are for informational purposes only and not for the purpose of providing legal advice or a comprehensive summary of recent developments in the law or treat exhaustively the subjects covered. For advice about a particular problem or situation, please contact an attorney of your choice.

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