



## Paralegal Pitfalls

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### ***Employment Practices***

Most sizable companies and organizations—not just law firms—understand that paralegals are essential to their success. Paralegals provide invaluable assistance by researching, gathering facts and monitoring pending transactions or filed lawsuits. According to a survey by the National Federation of Paralegal Associations, nearly a third of all paralegals work in companies, government and organizations—not in law firms (See 2003 Paralegal Compensation and Benefits Report, Executive Summary). Therefore, all legal employers must pay attention to laws and ethical rules that bear on the employment of paralegals

Legal issues affecting paralegals are much more extensive than the frequently expressed concern over the unauthorized practice of law. The Department of Labor often addresses the application of wage laws to paralegals. And it may surprise many attorneys that, in 2000, the California Legislature passed laws establishing minimum qualifications for the occupation. Revised statutes took effect in 2004.

Regardless of whether an employer designates its employees as “paralegals” or “legal assistants,” the occupation—at least in California—has a single, statutory definition, the contours of which can significantly impact legal employers. Before the California statutory enactments, individuals could present themselves as paralegals based on minimal credentials. Now, under California Business & Professions Code § 6450(a), with the exception of state employees, the following are acceptable minimum qualifications for the paralegal career:

- Completion of an American Bar Association-approved paralegal program or 24 units from an approved post-secondary institution
- A bachelor’s or advanced degree in any subject, with one year of law-related experience and a supporting declaration from a supervising attorney; or
- A high school or equivalent diploma, with three years of law-related experience—if completed before Dec. 31, 2003—and a supporting declaration from a supervising attorney.

Unless an employee completed three years before 2004, work experience in a law office

is now an insufficient prerequisite on its own for becoming a paralegal.

Besides the minimum qualifications, paralegals have continuing education obligations. Under § 6450(a), paralegals must certify to a supervising attorney that they have completed four hours of ethics courses every three years and four hours of legal training every two years.

The statutory requirements are important. It is unlawful to hold oneself out as a paralegal if the minimum qualifications are not met. Business & Professions Code § 6452(b) states that the “liability for any harm caused as the result of the paralegal’s negligence, misconduct or violation of this chapter” falls on the supervising attorneys.

It is easy to envision how the paralegal statutes can impact supervising attorneys. Consider a legal malpractice case where the attorney portrayed an employee as a paralegal to the client without verifying compliance with the statutory definition, and the employee’s acts or omissions actually caused harm to the client. The failure to confirm that the paralegal met the requirements could prove damaging. Separately, in cases in which a prevailing party can recover fees but faces opposition over the reasonableness of the paralegal’s billings, the failure to satisfy the statutory requirements could factor into the recovery. Notably, inadequate supervision of paralegals can also subject an attorney to Bar discipline. (See, e.g., *Chefsky v. State Bar*, 36 Cal.3d 116, 123 (1984).)

The requirements also matter because the statute itself establishes legal consequences for noncompliance. The law permits a “consumer” of legal services to sue the paralegal or supervising attorney for restitution, damages and attorneys’ fees for a violation of the paralegal statutes. Second, Business & Professions Code § 6455(a),(b) makes it a crime to hold oneself out improperly as a paralegal or for a paralegal to provide unauthorized legal services to clients; the paralegal and supervising attorney can both be found “guilty of an infraction” or “misdemeanor” and are subject to fines and even imprisonment.

## ***Paralegals and Employment Laws***

Aside from statutory minimum qualifications, legal employers should note the employment laws affecting paralegals.

**Overtime and Exempt Status.** Last year, in DOL Opinion Letter, FLSA 2006-27 (July 24, 2006), the DOL singled out the paralegal occupation in regard to wage laws. California employers must comply with state and federal laws and should therefore follow this federal issuance, which ruled that a paralegal in a corporate legal department was a nonexempt employee entitled to wage-and-hour law protections.

Before this, the DOL issued an even more instructive ruling in DOL Opinion Letter, FLSA 2005-54 (Dec. 16, 2005). The DOL addressed whether a law firm could classify its six paralegals under the “professional” or “administrative” exemption to federal wage laws and therefore not be required to pay overtime. The six had differing levels of education but all had significant client responsibility, and the law firm billed out their work to clients.

The DOL rejected the attempt to circumvent the wage protections. As for the professional exemption, the paralegals' position failed the exemption's "primary test because it did not require advanced knowledge in a field of "science or learning" that comes from specialized instruction. "The DOL ruled that the paralegals did not meet the administrative exemption because there was no exercise of "discretion and independent judgment with respect to matters of significance."

There are few exceptions to the occupation's nonexempt status. Exempt status may arise for a paralegal who "possesses an advanced specialized degree in other professional fields, applies advanced knowledge in that field to the performance of his or her primary duty" (e.g., a paralegal who provides significant scientific advice to a patent prosecution department). *Id.* at 3. Also, a paralegal who has climbed the ladder to management could fall within a separate exclusion, the executive exemption. Employers with questions on these legal gray areas should consult an employment lawyer or risk what are becoming prevalent claims for back wages and premium pay for wage law violations.

**Anti-Discrimination Laws.** A 2003 survey by the NFPA demonstrated that the average age of a paralegal was 40 years old. (2003 Paralegal Compensation and Benefits Report, Executive Summary.) This is the precise age that triggers liability for discrimination under the Age Discrimination in Employment Act, as well as safeguards for executing a valid release by, and the provision of employee benefits to, over-40 workers under the Older Workers' Benefit Protections Act. (See 29 U.S.C. § 621, et seq.)

Employers should consider these laws when taking employment actions. If a legal employer must downsize its support it should avoid layoffs carried out on the basis of income, particularly in California, given that use of income as the basis to terminate can constitute age discrimination "if use of that criterion adversely impacts era as a group." (Govt. Code § 12941.1.) Consequences for discrimination within a law practice go beyond legal penalties and can include Bar discipline. (See California Rules of Professional Conduct, Rule 2-400.)

**Employee Benefits.** When providing perks, such as payment for their paralegals' education, legal employers must consider employee benefits laws.

A legal employer can pay for a paralegal's continuing education courses on a tax-free basis if an employee could deduct the course as a trade or business expense (under 26 U.S.C. § 162) if the employee had paid for it. The tax code considers "working condition fringe" to the employee, who can exclude the employer's benevolent act from gross income (26 U.S.C. § 132). The employer can also deduct the payment from taxable income as an "ordinary and necessary" business expense under 26 U.S.C. § 162.

Paying law school tuition is different. For a paralegal who receives tuition aid, the resulting profession as an attorney constitutes a "new trade or business." (See, e.g., Howard Richard Pedolsky, TC Memo 1982-157 (1982)). The employee cannot deduct the tuition expenses from taxes, and so the employer cannot provide the benefit under Section 132 on a tax-free basis. The employer can, however, provide the benefit without subjecting the employee to

significant tax consequences, if it funds the education through a statutory “educational assistance program.” (See 26 U.S.C. § 127.) Despite the vast expense, paying tuition is considered “ordinary and necessary,” and the employer can deduct it from its taxable income. (26 U.S.C. § 162.)

Aside from exploring legal consequences, an employer should examine whether it will truly benefit from providing tuition assistance. Employers may expend considerable amounts, but the seemingly faithful employee could change his or her mind about law school—and working for the employer/ Frank, ongoing discussion is necessary in deciding whether such perks make sense.

## ***Privilege and Protection***

As a practical matter, paralegals frequently encounter confidential client information. They also come across the musings of their supervising attorneys, and they document some of their own musings. California extends the attorney-client privilege and work-product privilege to paralegals.

Paralegals are bound by the attorney-client privilege codified in California Evidence Code § 954. (See California Business and Professions Code § 6453.) One California case, *In re Complex Asbestos Litigation*, 232 Cal.App.3d 572 (1991), addressed the privilege. There, a plaintiffs’ firm appealed an order disqualifying it from multiple personal injury cases in which its paralegal had previously worked with the defense counsel by preparing subpoenas. The court affirmed the disqualification in cases on which the paralegal worked, given the lack of consent and the failure of the plaintiffs’ firm to construct an ethical wall around the paralegal. The court noted that the paralegal’s conduct affected attorney-client confidentiality.

As for work-product protection, state statute is silent, but California courts have indicated that there is indeed protection for a paralegal’s work. See, e.g., *Insurance Co. of North America v. Superior Ct.*, 108 Cal.App.3d 758 (1980) (paralegal notes not discoverable).

## ***Unauthorized Practice of Law***

Business and Professions Code § 6126 makes it a crime for anyone to practice law without a license. Attorneys must be cautious because, under Business and Professions Code § 6452(b), they are liable for the UPL of their paralegals. Furthermore, the California Rules of Professional Conduct, Rule 1-300, specifically prohibits lawyers from aiding their paralegals in UPL. The Business and Professions Code § 6450(b) sets forth acts that paralegals must not perform:

- Provide legal advice;
- Represent clients in court;
- Draft, explain or advise the use of any legal documents;
- Establish the rates for legal services;
- Perform paralegal services under any one other than an attorney;

- Induce a client to enter into a financial arrangement from which the paralegal will benefit.

In sum, legal employers need to make themselves aware of laws affecting paralegals. These laws are not burdensome and compliance with them will improve the practice of law for supervising attorneys and meanwhile advance the occupation of these valued employees.

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