



30+ Years Practicing Employment and Labor Law In Idaho In 30 Minutes

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 ISB Employment and Labor Section
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Disclaimers

- In telling my story, any resemblance to actual persons, living or dead is purely coincidental, **but they know who they are.**
- The opinions expressed herein are mine alone and do not constitute legal advice. **Stoel Rives made me to say that.**
- You'll be disappointed if you think I am going to share any of my wife's secrets to success in her court **because she has not shared them with me (and I can't appear before her anyway so I wouldn't know).**
- I started practicing before many of you were born, before desktops, email, the internet or AI. **I apologize for repeated references to "the good old days."**

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Four Topics

- Staying up-to-date on the law in a fast moving and evolving environment
- Getting, retaining and losing clients
- What kept me up at night
- Resolving disputes

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Staying Current

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Staying Up-to-Date on the Law

- Employment law changes frequently—you must remain diligent in following those changes
- Scanning legal updates and court decisions must be part of your daily routine
- Government resources can be valuable
- Traditional labor law still informs much of employment law
- Your colleagues can often be the best resource

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Clients

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Getting, Retaining and Losing Clients

- IRPC 1.1—do you have the requisite knowledge and skill to represent the client, if not, get help
- FRCP 1—”to secure the just, speedy and inexpensive determination of every action”
- Your client does not want a treatise but timely, practical and correct advice
- Referrals tend to be driven by your reputation, results, relationships and rates, but can often include your competition and other sources

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Getting, Retaining and Losing Clients

- Traditional business development activities provide mixed results
- Rating services/publishers are not a significant business generator, but more of a validator
- Institutional knowledge can be both a pro and a con strengthening your professional relationship
- Preparing a litigation budget takes practice and the inclination is to underestimate time/expenses
- You will lose clients through no fault of you own

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Sleepless Nights

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What Kept Me Up At Night

- FMLA—it's pain, particularly where intermittent or reduced schedule leave is at play
- ADAAA—additional leave as an accommodation is often overlooked in the interactive process
- WARN Act—aggregating prior layoffs are subject to important rules and timing especially in a sale
- Title VII—intent vs. impact still befuddles workers
- Retaliation is often the best/worst case
- FLSA—exemptions are narrowly construed; bonuses impact the regular rate and past mistakes can be a legacy liability

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What Kept Me Up At Night

- Confidentiality of medical records and post-employment medical exams
- Wage Claim Act—have all wages been timely paid
- ADEA—OWBPA compliance cannot be ignored particularly in early retirement and exit incentive
- ERISA—Are you dealing with a covered plan in circumstances where severance is offered
- Policies must be regularly reviewed and updated
- Attention to discovery requests cannot be overstated

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What Kept Me Up At Night

- As a lawyer you must ask if you're crossing the line and making yourself or your in-house counsel a witness
- Administrative proceedings can impact a subsequent lawsuit
- Prosecuting and defending restrictive covenant cases require a substantial frontloading of your efforts
- Sometimes you have to say “no” and “I don't know”

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Settlement

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Resolving Disputes

- Talk really is cheap—the earlier the better
- Mediation is not the only option
- Mediation is more than coming to a number
- A settlement is often just the beginning

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Resolving Disputes—Talk Really Can Be cheap

- Why not explore a resolution, both the employee and employer have a lot invested in the relationship
- There are misunderstandings which can be easily rectified, and some agencies really encourage early efforts to achieve a settlement
- Settling seldom opens any floodgates to future claims
- Early discussions might help to refine any classes
- Waiting on dispositive motions is not always wise

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Resolving Disputes—Mediation Is Not The Only Option

- ADR is of recent vintage—sometimes calling the other side and asking what's it going to take to settle this matter may be the best approach
- Binding arbitration is an option—it may be confidential, faster and less expensive
- A status conferences can be a good time to raise issues that might impact settlement negotiations
- Your ADR plan is a pleading that cannot be ignored—don't let the deadline slip by

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Resolving Disputes—Mediation Is More Than Coming To A Number

- Settlement involves negotiating many issues beyond monetary relief:
 - Reinstatement vs. separation
 - Tax consequences are critical
 - Benefit and Compensation issues
 - Confidentiality and non-disparagement
 - Turning the memorandum of settlement into a release without turning everything upside down

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Resolving Disputes—A Settlement Can Be Just The Beginning

- A release will frequently involve post-settlement requirements that can create additional liabilities
- Waivers of age discrimination include a 7 day right to revoke and payment must wait expiration
- Restrictive Covenants may survive separation
- Dismissal of a lawsuit may require court approval
- Retaliation claims loom large
- Benefit and incentive compensation issues
- Confidentiality and non-disparagement enforcement
- Turning the memorandum of settlement into a release without turning everything upside down

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Questions



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