community BANKER

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Welcome to the March/April issue of the COMMUNITY BANKERS' ADVISOR.

The ADVISOR is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

YOU ARE ASKING

Q: John and Joan are recently divorced. The divorce was not bitter, and they still seem to be friends. Joan is moving away and wants her name off of their joint checking account. Should we close the account to get her name off of it and reopen a new one in John's name only? Or is it sufficient to just "internally" remove her name because she sent us a hand-written, signed letter asking to be removed. Is that proper documentation to maintain the account but just remove her name?

A: No matter how friendly the divorce, close the John and Joan account and open a new John-only account. The days of looking at each check and comparing signatures is long gone - banks generally pay checks based on the MICR line and you most likely won't inspect checks to make sure Joan isn't up to something. The problem is that even if Joan signs your paperwork and is removed as a signatory, if she still has some blank checks, she can still negotiate them. When they are paid, the bank is liable because the signature is "unauthorized" under N.D.C.C. §41-03-40. You can, of course, go after Joan then, but the problem can be avoided if you close the old joint account.

Q: The daughter of a recently-deceased customer brought in a large check payable to the estate of that customer. No probate has been started yet, and so there was no estate account. She wanted to deposit the check into the deceased customer's family trust account, but we declined to do that; we told her that she needs to visit with a lawyer about probating the estate and opening an estate account. Your thoughts?

A: You were correct in not depositing the estate check into the family trust account. Under North Dakota law, an estate is a "person" and the trust is a *different* "person," and the personal representative is the one who should endorse the check for the estate. *See* N.D.C.C. § 41-03-10(3)(b)(1) (identification of person to whom instrument is payable.) For example, Jack Dalrymple and Drew Wrigley are different persons - you can't disregard that a check is payable to Jack and deposit into Drew's account.

Q: **Mabel Jones brought in a U.S. Treasury refund check is made out to Paul L. Jones and Mabel C. Jones. Paul Jones is deceased and Mabel's name is on the second line of the check. The check from the Treasury does not have "deceased" or other notation after Paul's name. His estate was not probated. What is the proper endorsement?**

A: Because of the "and" included in the designation of the payees, the U.S. Treasury has indicated that it expects (and North Dakota's UCC requires) two endorsements. "If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced *only by all of them*." N.D.C.C. § 41-03-10(4).

The first endorsement should be by the Estate of Paul L. Jones (by the personal representative of the estate) and the second endorsement other would be by Mabel C. Jones. Because there is no probate, there is no personal representative. Direct Mabel to the local IRS office; they can clearly explain what they want from her, or how to obtain a replacement check.

Q: We were presented with a check made out to: Betty Smith and/or Molly Johnson. Who is entitled to negotiate and cash the check?

A: In this case, either one of them because the check is payable. If an instrument payable to two or more persons is *ambiguous* as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively. In other words, here it would be treated like an instrument payable to Betty *or* Molly. N.D.C.C. § 41-03-10 (U.C.C. § 3-110).

Q: Every year there are a couple of bank robberies in North Dakota. We have certain procedures in place in the event that ever happens, God forbid, but we aren't fully prepared to deal with the media stampede that we often see coming *after* a robbery. Any suggestions?

A: There are a number of things we can think of:

(1) Name one person to deal with the media - a bank officer who feels comfortable in that role, or your bank's attorney;

(2) Instruct all other employees not to speak to reporters;

(3) No reporters in the bank until police and FBI have completed their investigations;

(4) Don't allow the media to take pictures inside of the bank, or of any witnesses if you can control that;

(5) Do not reveal names of any tellers or witnesses;

(6) Do not reveal the amount of money taken;

(7) Do not discuss your security system!;

(8) Do not discuss your security procedures!;

(9) People know this happened, so, if local law enforcement and the FBI agree, give the media some information: the date and time of robbery, the name and business number of your spokesperson, the fact that that person is the "official" spokesperson and only that person will be making comments, and a short statement assuring customers it is safe to continue to bank here. Beyond that, it's prudent *(and true)* to say that you cannot comment on an ongoing investigation.

Q: If a check comes through without a payee named, who is it payable too?

A: A promise or order is payable to bearer - the holder of the check - if it does not state a payee. N.D.C.C. § 41-03-09(1)(b) (U.C.C. § 3-109). Without a payee, the check is an incomplete instrument under N.D.C.C. § 41-03-15 (U.C.C. § 3-115), but it is enforceable. The example given in paragraph 2 of the Official Comments is helpful:

> "Suppose Debtor pays Creditor by giving Creditor a check on which the space for the name of the payee is left blank. The check is an instrument but it is incomplete. The check is enforceable in its incomplete form and it is payable to bearer because it does not state a payee. Section 3-109(a)(2). Thus, Creditor is a holder of the check. Normally in this kind of case Creditor would simply fill in the space with Creditor's name. When that occurs the check becomes payable to the Creditor."

Q: Mr. X has banked with us for about two years. During this time, we've noticed that he changes his mailing address at least once a month; last month, he changed his address twice - from a P.O. Box in one town to a P.O. Box in a nearby town. It's always a different P.O. Box in a different town. We believe these frequent mailing address change requests are suspicious - should we report this?

A: This is not typical customer activity. Visit with your compliance officer and conduct a review of the account. Depending on that meeting and review, you may need to talk to Mr. X and ask some simple questions to understand why he changes his address so often. It's possible he's doing something illegal - 12 or 13 changes a year isn't normal. It also places a burden on your bank - do his statements get to him? Do you want to keep him as a customer? You should also consider filing a Suspicious Activity Report.

EMPLOYMENT MATTERS

The 10 rules every HR professional must know

While lawsuits may be practically inevitable in today's litigious society, losing them is not. Use the following 10 rules to prevent the most common employment-related lawsuits—or at least increase your chances of winning them.

1. Conduct thorough background checks on applicants. You can learn a lot by reviewing applicant histories. Have they recently been convicted of crimes involving fraud, dishonesty or violence? While such evidence is not necessarily disqualifying in every case, it can be instrumental in determining whether an applicant is a good fit for your company.

2. Provide accurate and adequate references for ex-employees. Generally, provide neutral references for former employees: confirmation of dates of employment and final wages. Like all rules, this one has exceptions. For example, an employee fired for violently attacking a co-worker may present a future risk. Withholding that information from another employer can expose your organization to liability. Ideally, if you intend to provide a more detailed response to a reference request, get a release from the former employee in advance.

3. Consistently follow progressive discipline policies. The most prevalent employment law claim is that an employer treated someone differently (based on sex, race, age or other distinguishing characteristic) than somebody else for the same behavior. The key to minimizing and defending those claims is consistent application of progressive discipline within the same department—or better yet, throughout the entire company.

4. Keep personnel policies and manuals up to date. It may change slowly, but the law does change. Don't base your defense on a policy that was last updated in 2005. Review your policies and update your employment manuals at least every three years. If the law changes in a way that affects a particular policy, quickly issue a supplement to the employee handbook.

5. Coordinate decisions and responses to the government. A single employee can raise racial discrimination with the EEOC, a violation of the FMLA with the U.S. Labor Department and a claim of unsafe working conditions with OSHA. Designate the HR department to coordinate and respond to all three agencies. Allowing different departments to respond separately to what may be a single factual issue can lead to fatal inconsistencies that will be impossible to explain should the matter end up in front of a jury.

6. Train supervisors on the policies and the law. Without even knowing it, frontline supervisors can find themselves in dangerous positions: "speaking for the company" on personnel issues. If HR doesn't provide basic training on those issues, the result is too often an inadvertent and potentially expensive employment law violation—for which the company itself will be liable. Provide basic HR training to supervisors upon hire and at least once a year thereafter.

7. Avoid making promises that turn into contracts. A throwaway comment, like "as far as we're concerned, you'll have this job as long as you want it," can create an arguable claim by the employee for long-term employment that takes him or her outside the "at-will" category. Make sure your supervisors and managers know not to make statements that offer terms and conditions of employment outside what an employee's job description normally allows.

8. Take complaints of harassment seriously. Your strongest defense against losing a harassment case in court is a proper policy that forbids harassment of any type. Unfortunately, simply having a detailed policy is not enough; for it to truly be effective as a defense, you must follow it and enforce it fairly and consistently. If you receive a harassment complaint, move quickly to investigate it and impose appropriate—and consistent—discipline.

9. Comply with record-keeping requirements. A company can successfully defend a frivolous claim, yet still get hit with thousands of dollars in fines by an investigating agency just for failing to maintain records as required by law. Any agency can request copies of legally mandated files and policies during any investigation, regardless of the reason for starting the investigation. Know which documents you must keep, and make sure you can easily retrieve them (whether in paper or electronic form).

10. Anticipate possible litigation and act appropriately. Along with training your supervisors on the basics of the law, also train them to recognize the signs of a potential lawsuit. Repeated requests to view disciplinary or personnel files, strongly worded objections to annual evaluations and "legalistic" sounding emails or memos sent to a supervisor or HR are all signs that an employee is contemplating legal action. In those situations, HR should get ahead of the problem by seeking legal advice and taking quick and coordinated steps to prepare for a claim. A manager's early tip-off can greatly speed the process.

(By Matthew Effland,
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