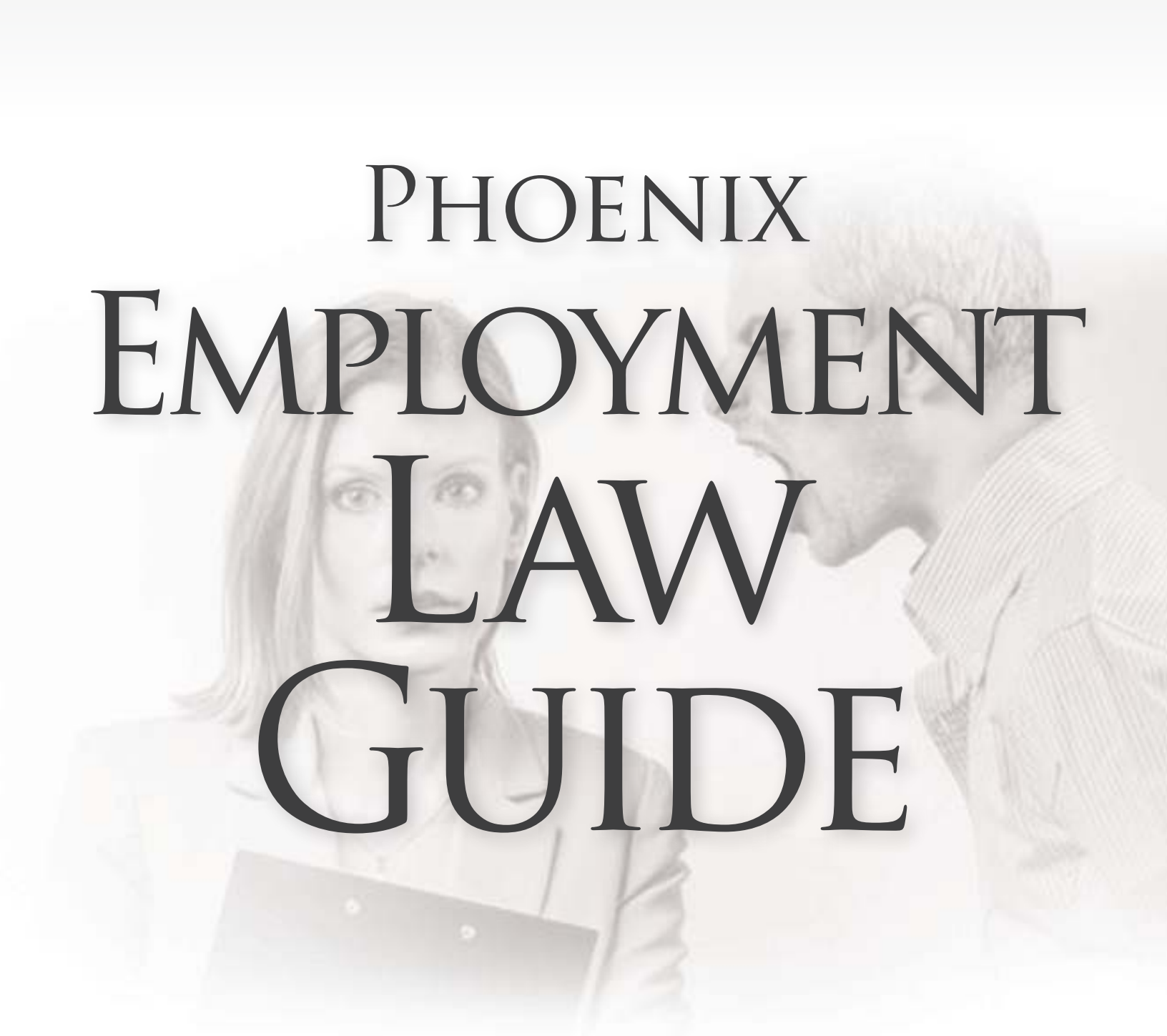


Phoenix Employment Law Guide

Quacy L. Smith
and James M. Green

SG Smith & Green
Attorneys at Law, P.L.L.C.

Do you feel like you work in place where you are no longer safe because of the way others act? No one should have to feel threatened or frightened of going to work every day. Federal and state labor law is supposed to ensure that employees are treated fairly by employers. Sadly, it doesn't always happen. Many employees are afraid to talk with a Phoenix labor and employment lawyer. They don't want to lose their job. They want to make sure they can find work in the future. The bills certainly don't stop coming in if you're wrongfully terminated or if you're forced to leave because of unchecked harassment. If you believe that your employer may have violated federal or state law, contact a Phoenix labor and employment lawyer to discuss your potential claim.

The 6 Most Common Forms of Employee Mistreatment

Labor and employment law may be handled at both the federal or the state level. It covers a lot of ground including; child labor, FMLA, federal/ government contracts, healthcare plans, retirement, safety standards, and work authorization for immigrants. Of course, that's a partial list. The 6 most common forms of employee mistreatment include:

1. Not meeting minimum wage requirements
2. Ignoring overtime pay laws
3. Misclassification of employees
4. Workplace discrimination
5. Workplace retaliation
6. Wrongful termination

We're going to explain the basics of each of the 6 most common forms of employee mistreatment. If you believe that you've been mistreated by your employer in one of those ways or in another way covered by federal or state law, contact a Phoenix labor and employment lawyer to discuss your potential

claim. These claims must be filed within a certain amount of time after the incident occurs. Missing that window could result in you losing your potential legal rights.

Not Meeting Minimum Wage Requirements

In most of Arizona, the minimum wage that can be paid to an employee is $10.50 an hour. The state is scheduled to increase the minimum wage to $12.00 an hour by 2020. All employees are entitled to earn the full minimum wage set by state or federal law, regardless of whether they are entitled to tips. Federal minimum wage is currently $7.25 per hour. Employees who are paid in tips can make as little as $7.50 an hour provided that they earn enough in tips to receive the state's minimum wage of $10.50 an hour.

Failure for an employer to pay at least minimum wage is a violation of Arizona's labor and employment law. Depending on circumstances, the employer may also be in violation of the FLSA. The FLSA sets the federal minimum wage.

Ignoring Overtime Pay Laws

The FLSA has another job besides setting the federal minimum wage. It also creates standards related to overtime pay. Employers are required to provide overtime pay to nonexempt employees who are covered by the FLSA. That includes hourly employees and even some salaried employees. Overtime pay is set at the rate of 1.5 times of an hourly employee's rate if that employee works more than 40 hours in a week.

Executives, administrators, and other professionals who earn at least $455 per week are exempt from overtime under Arizona law. So are certain salespersons (such as those who set their own hours), certain IT/ computer employees, independent contractors, certain transportation employees, employees of farms, employees in the agricultural industry, and employees who live with their employers (such as a cook, housekeeper, or nanny).

Don't dismiss your potential claim. Certain types of professional employees, such as nurses, are entitled to overtime pay. To learn more and find out if you should have received overtime pay, contact a Phoenix labor and employment lawyer to schedule a consultation.

Misclassification of Employees

How your employer classifies you can affect your legal rights. Many employers know this and purposefully misclassify workers to avoid certain responsibilities. There are three classifications used by employers: exempt employees, nonexempt employees, and independent contractors.

An exempt employee isn't entitled to overtime pay; they're also not protected by the FLSA. For an employee to truly be exempt, they must fall within a certain category of work or earn more than $455 per week as a salaried employee. Again, though, don't let the thought of being a salaried professional make you automatically believe that your employer properly classified you. The FLSA doesn't say all professionals who make salary are automatically exempt. A Phoenix labor and employment lawyer can determine whether you're properly classified as exempt.

A nonexempt employee is an employee who is entitled to overtime if they work more than 40 hours in a work week. They generally earn less than $455 per week, but they may earn more.

An independent contractor is someone who performs specific tasks as an employee might, but they're not classified as an employee. As such, they aren't protected by the FLSA. They are required to handle their own taxes. They're not entitled to unemployment or workers' compensation. Under Arizona law, when an employer hires an independent contractor, they must secure the designation of an independent contractor by having the worker sign a declaration of independent business status.

If you believe that you may not be properly classified by your employer, reach out to a Phoenix labor and employment lawyer who focuses their practice on helping employees.

Workplace Discrimination

Workplace discrimination covers a wide set of actions. It can involve hiring or firing (although we'll talk more about wrongful termination on its own), how job assignments are made, how much employees are paid, how promotions are given or denied, opportunities for training, and available fringe benefits. Discrimination can be a violation of federal and state law.

Under Title VII of the Civil Rights Act, workers are protected from discrimination based on their sex, race, color, national origin, or religion if the employer has 15 or more employees. Employers may not refuse to hire or fire someone or discriminate against them (including their pay, conditions of employment, benefits, and privileges) based on those five protected classes. They also may not segregate or otherwise classify an employee to deny them employment opportunities or to otherwise impact their status as an employee.

Another form of discrimination in the workplace is sexual discrimination. The Equal Pay Act of 1963 is a federal law that says employers may not discriminate against employees (including what they're paid) based on the employee's gender.

Age discrimination is also prohibited by law. Employees who are 40 years of age or older are protected from being discriminated against in hiring, firing, or withholding of a job promotion.

Individuals with disabilities are also protected under several federal laws when it comes to employment. It is considered discrimination to create qualifications simply for the purpose of disqualifying someone with a disability. Employees may not deny a disabled employee the opportunity to be a member on a planning or advisory board. There are many other ways that employees and individuals with disabilities may be discriminated against. If you would fall under the umbrella of disability and believe that you were discriminated against, don't wait to contact a Phoenix labor and employment lawyer to learn more about your potential claim.

Workplace Retaliation

Sometimes, employers don't do the right thing and employees must be brave and speak up. This should be greeted with an open attitude and a desire to change. Yet, many employees are punished via workplace retaliation. This is also common when an employee files a complaint for discrimination or harassment. Retaliation is an act that punishes an employee for enforcing their legal rights. The most common versions of workplace retaliation include immediate termination without an explanation, demotion after filing a complaint, being subjected to a pay decrease, threats, and loss of a rightful promotion.

Arizona state law also protects employees from retaliation. Document the incident or incidents when they happen and contact a Phoenix labor and employment lawyer.

Wrongful Termination

Arizona is an at-will state for employment. So, employers may fire an employee if they have good cause or no cause, but they can't fire someone for a bad cause. A bad cause would be because they're acting in a way that is discriminatory, retaliating for whistleblowing by an employee, because an employee refuses to break the law, or for other reasons.

If you believe that you were wrongfully terminated, contact a Phoenix labor and employment lawyer to evaluate your potential claim.

Frequently Asked Employment Law Questions

How Should I Choose an Employment Lawyer?

Unlike with some other areas of law, employment law is such a specific, fine line. It's such a narrow pathway of law, particularly discrimination law, that you really need someone who is experienced in those laws. Someone that has experience with the government agencies, the EEOC, Department of Justice, Department of Labor, and that are the gatekeepers for these laws. Again, you

must have Notices of Right to Sue before you can just march into State or Federal Court and file suits against employers for potential violations of the law. It's in this particular area of law I believe more than any other of law, you need someone that is experienced with discrimination law, with EEOC law, and with those agencies.

One of the things that we pride ourselves on at Smith & Green is that we have substantial experience in those areas, particularly with the EEOC, with the Department of Justice for Arizona dealing with the US Department of Justice, and other federal agencies. You will definitely need that experience from someone that understands the sensitivity of the matter. This is your livelihood. This is food on the table for your family. When someone has an impact to their employment, it seems like their world goes upside down. You want someone that is experienced, that is assertive, aggressive when need be, but also that understands the compassion behind someone when their life has been upset.

What Should I Bring to an Employment Law Consultation?

One of the things about investigations and a part of the initial process of any legal representation is investigation. It's no different with employment law. What a client should bring, is all of the information, the evidence that they have gathered, or anything that is related to that cause of action. You'd be surprised how many things clients leave at home that are related to what happened but they don't think is significant. A trained eye of a skilled lawyer would be able to look at something that you may think is insignificant but because they know the elements and the factors of the law and the case law associated with certain things, what you may consider to be insignificant could be very significant.

I would urge you to bring everything that you could even think might be evidentiary. Let that lawyer work through the information with you. The items, the videos, the recordings, the documents, the write-ups, the doctor's notes, whatever it may be that's associated with it so that they can determine what's evidentiary.

What is related to this matter that they would need to help prove your cause of action.

Remember, after the EEOC process, there's always a great possibility that the matter will be filled in court and you will need that kind of evidence. You'll also need information, names, addresses for your potential witnesses; your dates of employment; paycheck stubs if it involves some depreciation in pay or exclusion of pay. If it was an ADA issue that involves some type of medical issue, you'll need medical records then, and doctor's notes, and contact information. After that initial consultation and meeting with that lawyer, they'll also be other things they will instruct you to bring. That's to make sure that your claim is pursued holistically and you have all of the information you need to make your claim successful with the EEOC and subsequently with the court should that become necessary.

Questions About the EEOC

What is the EEOC?

The EEOC stands for the Equal Employment Opportunity Commission. It is a government entity that is run by a group of commissioners. It's established under the laws of the United States of America. It's a federal agency.

They are charged with the responsibility of monitoring. They are the gatekeepers for lawsuits against employers that meet certain criteria that is based on a very few specific set of laws. In fact the set of laws and statutes that the EEOC is responsible for being the gatekeepers over is really only five laws. It's the Title 7 of the Civil Rights Act of 1964; the Americans with Disabilities Act of 1990; the Age Discrimination in Employment Act, and the Equal Pay Act; also the Genetic Information Act, which is commonly referred to as GINA. Out of those five set of laws, predominantly is where we derive what we call equal employment law.

The EEOC is a third-party neutral agency that is charged with the responsibility of investigating claims against employers, and/or receiving these claims from employees that feel like they have been discriminated against or treated

unfairly, based on those five sets of laws. It's out of those laws where you get equal pay issues, where males maybe being paid more than females, where you get sexual harassment claims that fall under Title 7, disability.

Virtually what happens, as those claims are brought before the EEOC and there are certain statutory limitations that apply, they're charged with investigating those crimes. They have a team of investigators that will investigate those claims and see if there was actually a violation of the law. If there's a violation of the law, they'll issue what they call a cause finding on those laws and then they pursue – if the claim has that type of merit, they pursue the employer for the employee. If they're not able to mediate or conciliate the case, they'll issue a notice of right to sue, which gives you the right to go sue the employer in state of federal court on your own.

One of the reasons why the EEOC is important is that based on one of those five laws, you cannot just walk into court and sue an employer based on one of those five laws. You would have to get a notice of right to sue, as it's called, from the EEOC. Once a notice of right to sue is issued, you would have 90 days from that time to file a lawsuit against the employer in a federal or a state court.

How Do I Bring a Claim to EEOC?

If you feel like you've been subjected to some form of discrimination and you have a claim against your employer for harassment or discrimination, rather than going to EEOC yourself, we suggest that you see an experienced employment attorney. If you come to our office, one thing that we will do is sit down with you. We will interview you, gather all the facts related to your case, determine whether you have a good case, and counsel you as to whether we think you should pursue that matter with EEOC. Then on top of that, we will draft the charge for you. We will submit the charge to EEOC personally. Then we will follow through with EEOC and all the steps that take place after that. Our recommendation to you is not to go to EEOC and let them draft the charge in the way that they think is best for you, but to come to an experienced employment attorney that can help you with that.

What is the EEOC Claim Process?

The EEOC's process is a very distinct process that must be followed, and it's important that the process is followed because once the matter is filed in court, one of the reasons the case could be dismissed is if all of the administrative proceedings have not been adhered to. Understanding the EEOC process is critical. A lot of lawyers that are not experienced in that area don't understand the EEOC process. We're fortunate here at Smith & Green that our managing partners were former EEOC investigators, so this is the world that we lived in for some time, understanding the process.

Virtually what happens with the EEOC is, once you've voiced your concerns with the employer, you file a claim with the EEOC. That could be done either by walking in or online. You schedule an interview with an investigator. This is when you lay out your concerns as to why you feel you have been discriminated against, based on one of those five laws.

It's important to note that some of the claims have a 300-day statute of limitation on them, other claims have 180-day statute of limitation on them, which literally means you must have that claim filed with the EEOC or it's a fair agency, which is a state agency that's charged to collect those types of claims or address those claims. In Arizona, it happens to be the Arizona Department of Justice.

Not all employers qualify under the statute of the EEOC. If you're going to file a race discrimination claim because you feel like you are being treated differently than people who are of a different race, sex, religion, or skin color than you, that employer has to have at least 15 employees. That's the broad rule, at least 15 employees to qualify, to be subject to the rules or the requirements of Title 7. If that employer only has six employees, they wouldn't qualify under Title 7.

Now there may be some other local codes that could hold that employer accountable, or state codes that could hold that employer accountable. Under the federal statute, Title 7, they would have to have 15 employees. If the employer only has one employee and has only had one employee for an entire year, Title 7 is not going to be your statute of choice to pursue under. That's just

an example of how the EEOC works. They would look at this to make sure that that employer is actually subject to the law of Title 7 or some of the other laws.

You would go down to the EEOC, schedule it over the phone or you could do a phone interview, or you can come to a lawyer's office that has all the information. They would draft up a charge for you, referred to as a Form 5. That is the charge of discrimination. It is a plain and simple statement of what has happened to you.

Once that charge is filed with the EEOC, the tolling time stops at that time. In other words, time is tolled at that point; the statute of limitation, if you're within that 300 or 180 days, is suspended. Some of these cases go on for years and years. It's suspended at that point. You are safe. At some point, you will be able to file in court, once you receive a notice of right to sue from the EEOC. At that point, the EEOC generally has about ten days to make sure that that claim is served on the employer.

If that investigator determines that the claim has merit to it, then that employer will be required to submit a response, or what the EEOC refers to as a position statement. A lot of times, especially with bigger employers, they will hire outside counsel; some of them have inside counsel.

This information is submitted to the investigator and the investigative staff at the EEOC, to either conduct interviews or analyze the evidence submitted by both parties. They can conduct fact-finding conferences where they bring the parties together, sort out the facts and then that yields their determination. They can interview managers. They can interview your witnesses. They can request information from the employer like records and different things, pursuance to the Freedom of Information Act.

Prior to investigation, there is something that can happen, which is called mediation. The case is referred up to mediation, depending on how it is. Not all cases qualify for mediation, but some cases do qualify for mediation. This is where the case goes to another division of the EEOC, the non-investigative division. They try to resolve those claims. They bring the two sides together with a EEOC mediator. Some EEOC offices have contract mediators they bring in to sit down with the parties, to try to mediate those claims.

If a resolution is met in mediation, then the EEOC can enforce the mediation agreement. Oftentimes, this is preferred because litigating these employment law cases could be quite lengthy and could be quite expensive. It's like David versus Goliath. You have this big company who has deep pockets, and this employee who has legitimately been treated differently. Mediation is always something that I would recommend employees and employers to look into because it's a chance for you to resolve the issue. Nobody is going to leave the mediation feeling like they necessarily won, but again, it's that middle of the road.

If the case is unsuccessful in mediation, then it pursues in the investigative track. The EEOC oftentimes gets behind because of staffing issues, so it could take a case a couple of years to resolve or to get to some type of conclusion. At the conclusion of that case, the EEOC investigator, or the director of that particular office, will sign off on the decision. They will determine that there was a cause finding, that the law was violated or there was a no-cause finding. In either case, they can issue you a notice of right to sue.

If they have a cause finding, then they take the case into conciliation. Again, it's similar to mediation but once the EEOC determines that the law has been violated, at that point is when they lose their neutrality. Throughout the entire process, remember that the EEOC is a third-party neutral agency; they're not for you, they're not for the employer. They're just gathering the facts and making a determination.

Again, they are a third-party neutral agency. That is the big misconception with most employees. That you're going down to the EEOC and they're going to fix it. Well, that's not true. They will look into it but it's not until they find that the law has been violated where they shed their neutrality and then they tell the employer, we believe that you have broken the law in this case. We want you to come to conciliation with us and try to resolve that.

Again, there are caps and statutory requirements to things that they can ask for and things that they can't ask for. It's all controlled by the law. If conciliation is successful, then the charge of discrimination is resolved, no lawsuit is filed. If the conciliation is unsuccessful, then the EEOC can opt to sue the employer on the employee's behalf. Those are the great minority of cases. Nine times out of

ten that does not happen, unless there is a class of people or it's some specific segment, element of law that needs to be more defined. Then the EEOC will have some of its attorneys pursue on behalf of that employee, if it's egregious.

I've seen several occasions where the fine attorneys over at the EEOC will pursue a matter for the employee. If they're not able to resolve it in conciliation, then the EEOC will issue that notice of right to sue and the cause finding, to the employee, instruct the employee that they have 90 days to file the matter in court and they have a finding from the EEOC that the EEOC believe that the employer has broken the law.

This is the point where most people go looking for a lawyer and say, I got 90 days to file this in court. It's beneficial to have a lawyer early in the process; especially lawyers who are experienced with dealing with the EEOC. Many attorneys will turn you away.

What is the EEOC Conciliation Process?

The EEOC conciliation process is very similar to the mediation process. The conciliation process happens after the EEOC has determined that the employer has violated one of the laws. Before issuing a notice of right to sue, the EEOC will invite the employer again to conciliation, which is very similar to a mediation. The only difference really is that the EEOC starts requesting specific things.

If the employee is not represented by counsel, they'll start requesting specific things because they have determined that that employer has broken the law. It's at that point, where the EEOC, who in its normal course of business, is a third-party neutral agency. Once they determine a cause finding, they lose their neutrality and they become, for the employee, once they determine the law has been broken and they enter the conciliation process.

If the conciliation process is successful, then the case is resolved. Whatever damages or relief that they come to an agreement on, they're awarded to the

employee. If it's unsuccessful in conciliation, then the notice of right to sue is issued and the employer hires their own attorney, which, hopefully at that point, they've already had an experienced attorney in that area and they proceed to court on the matter. Or in some cases, the EEOC chooses to take the matter to court on behalf of the employee. If the employee already has counsel, the EEOC sometimes co-counsels with the employee's private attorney.

Again, this is something that you as an employee, shouldn't try on your own. You need an experienced lawyer that understands the EEOC process, the law, and the conciliation process because at that point, it's been determined that the law has been broken and you are due some relief. An experienced lawyer will make sure that you leave that conciliation process with everything that is due you, based on the damages that you have been subjected to by that employer.

Why Are There EEOC Delays?

Many of our clients are frustrated by the EEOC process. A lot of it is not necessarily EEOC's fault. Currently, staffing levels at EEOC are at historic lows. They currently have 11 investigators in the Phoenix district office. They're supposed to have about 33. They currently have two mediators in the EEOC office. They typically have four or more. They also don't even have their supervisor.

Right now, a lot of investigations are taking a lot longer than they typically would take and that frustrates a lot of people. It's frustrating to us as well because we want EEOC to wrap up the investigation and make a cause finding so that we can pursue it. These investigations typically take anywhere from six months to as long as four or even five years for EEOC to complete. That's a long time. Again, it's frustrating for everybody.

What we prefer to do is have the EEOC finish that process because we want EEOC to make a cause finding. If the EEOC makes a cause finding, then they will be issued a letter of determination. This letter of determination is something that we can use in court as evidence that the company committed some form of wrong.

One benefit that we have here at this law firm that others don't is that we know many of the EEOC investigators that are former co-workers. Many of them are our friends. That won't necessarily help you with getting a cause finding, but it

is helpful when we can call them and say what's taking so long? What can we do to speed this up? What information can I provide you? Do you need a list of witnesses' phone numbers? I can provide you with affidavits. There are certain things that we can do to help speed up that process and make it easier for them to reach a decision in your case.

Another thing that we do is when the company responds to a charge of discrimination, it's something that's called the position statement. A position statement can be anywhere from five to ten pages long, and it's the company's response to the allegations in the charge of discrimination. What we do is we ask EEOC for a copy of that position statement and then we work with our clients to draft a rebuttal to the position statement. Then we send that rebuttal to EEOC. We will also send a copy of it to the employer and ask that they pay a certain demand for the harm that they have caused our client.

This helps speed up the process because EEOC's investigator can look at our response and see what witnesses need to be interviewed. It can help them in their analysis when they're drafting their memorandum to their supervisors, to make a determination in their case.

What is EEOC Mediation?

EEOC mediation is an opportunity that is offered to some charging parties, or persons that are bringing charges against employers early on in the administrative process that the EEOC is responsible for taking care of. Normally how it happens is immediately after a charge is filed with the EEOC, if it's not dismissed because there's a lack of merit, the charge is routed up to the alternative dispute resolution department, that houses the mediation section of the EEOC. They determine whether the case is worthy for mediation. If it fits certain criteria, it would warrant mediation.

If it's selected by the EEOC for mediation, then the parties are contacted and they're invited to mediation. Mediation is a voluntary process and both sides and the EEOC must agree to the mediation for the mediation to go forward. If one side decides not to participate or declines EEOC mediation, then the case will enter back into the investigative track.

Before accepting an offer to mediate, which if you haven't been represented by an attorney at this point in your EEOC charge, I would highly recommend that you contact an experienced attorney that is familiar with EEOC law. This is a great opportunity for you as the employee to cut down some of the time that could be associated with the investigation, to get similar remedies upfront with less cost to you. Oftentimes, it's similar or better than what could be achieved at the end of an EEOC investigation, or after the matter has been filed in court. It's an opportunity that you really should look at, based on the strength of the charge and the facts.

Again, it's a case-by-case scenario so there's not one blanket answer. I always refer employees to mediation when the case and the facts warrant such. The beauty of having an experienced employment lawyer that is experienced with EEOC law is you don't go to those mediations unrepresented. One of our attorneys, not a paralegal, not legal staff, an attorney, will actually sit there with you; make sure that your claims are forwarded. Oftentimes, the employers will show up with high powered lawyers, and they're representing their interests and their job. Their interest is to walk away from the table with as little damage to them as possible.

With an experienced lawyer, you can make sure that that EEOC mediation process is fruitful for you and successful; to make sure that your claims have been addressed and that some of the remedies that you're seeking has been made whole. Again, if you're at that point where you've been invited to EEOC mediation, or you feel that it may be pending soon, I would highly recommend you contact a lawyer experienced in that area so that they can walk you through that process. It can be very fruitful for you and speed up the process of your charge of discrimination.

Questions About Discrimination

What Can I Do If I'm Being Discriminated Against at Work?

We recently had a client come to us who felt that they had been subjected to discrimination at work. It can be confusing sometimes whether what happened to you is discrimination first of all. Then secondly, whether that particular type

of discrimination is protected under one of the laws that are enforced, either a federal law or a state law. If you believe that you've been subjected to discrimination, we recommend that you contact an experienced employment attorney.

If you come to our office, we will sit down with you. We will go through the facts of everything that's going on with you at work. We will listen to you tell your story, what you believe is discriminatory, what's happening to you. We will determine whether or not what is happening to you is something that we can do something about. If so, we can put you on the path to filing a charge of discrimination with the EEOC if that's necessary or pursuing it through some other means. We recommend that if you feel like you've been discriminated against at work, don't do that legal research on your own.

Can I File for Age Discrimination?

We recently had somebody contact our office who wanted help because they felt like they were being discriminated against on the basis of their age. The problem was that this particular person was only 23 years old. One thing to keep in mind is that the Age Discrimination in Employment Act only protects individuals that are age 40 years and older, what we refer to as the protected age group. The Age Discrimination in Employment Act is still a very important law. There are a lot of people who have been at work for a long time and are facing discriminatory comments, or making a mockery of their age, or making jokes about them. Harassment is a big issue with the Age Discrimination in Employment Act.

Another issue that people that are in that particular age group have is applying for positions. Some individuals go to apply for positions and the job posting is asking for somebody who is young, somebody who's energetic, a digital native. All of those terms design to bring in somebody who is younger. If you're applying for a position, and you can't get that position, and they have something like that in their job posting, please contact us so that we can help you.

What is the Americans with Disabilities Act?

The other day, we had a client come in. He had several questions about the Americans with Disabilities Act. Whether or not that law provided protections to him due to his particular condition, and whether or not his condition constituted

a disability. Those questions can be very complicated and can require a detailed legal analysis. We recommend that if you have any questions regarding whether or not your condition meets the legal standard of a disability under the law, we recommend that you come to an experienced employment attorney.

What we would do if you come to us is sit down with you, gather all of the facts and details related to your medical condition, help you determine whether or not your condition meets the definition of a disability under the law. Some people may have conditions that they think are not disabilities. There is a high probability that your condition is, in fact, a disability under the law and that you are afforded certain protections. The employer may be required to provide you with a reasonable accommodation to help you perform the essential functions of your position.

What is Constructive Discharge?

Constructive discharge is when the work environment becomes so hostile, so intolerable, that a reasonable person of reasonable sensibilities under the same set of conditions would find that environment so objectionable that they would not continue in their pattern of employment. We call it constructive discharge because the employer has allowed something, tolerated something, or been in fact the actor in something that has caused that environment to become intolerable to the reasonable person.

If you have been placed in a situation where you feel like you've had no other choice but to quit, there could be some action under the law. If you are in that place and you have not quit yet, I would certainly urge you before you quit your job to contact an experienced employment lawyer because they can look at the law based on that environment and help guide you up the road concerning that. However, if you're on the other side of that, you already made it, you couldn't take anymore, you need to get on the phone and contact an experienced employment lawyer that can point you up the road and let you know what your rights are. Maybe there was some cause of action before that misstep by the employer.

Again, there's no one rule that's a clear answer; it's a case by case scenario as to whether quitting your job would qualify as constructive discharge. There's certainly coverage for that under the law if that working environment has become so terse, so difficult, so intolerable that a reasonable person would no longer feel it wise to work there. You see a lot of that in sexual harassment cases, or cases where racial expletives have been used to the point where you've reported it several times and it's continued. These are cases that fall within that framework of constructive discharge. You need to talk to a lawyer sooner than later because again, on the day that you quit, that's when the clock starts ticking and the statute of limitations starts to run.

I was Denied Promotion for Person with Less Experience

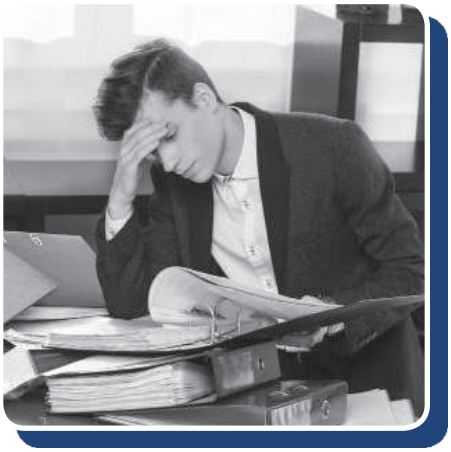
We recently had a client contact us because they were denied a promotion. They were clearly the most qualified person for that position or at least they felt they were. They had the most experience for that position. Yet, the employer chose somebody who was younger than them who hadn't worked for the company nearly as long. If you're in that situation, I recommend that you contact an employment lawyer to find out what you can do because it's possible that you were discriminated against on the basis of your age. It's possible you were discriminated against on the basis of a number of other protected categories. Please contact an employment lawyer to help you determine whether or not you were subjected to some type of discrimination and what actions that you should take.

What Are Discrimination Damages?

One of the questions that we most often get is what can someone recover? What are the damages and what can they get? Now that they've been discriminated against, what is the value of their case? What I would tell you is that those values are all across the board. In some cases, you're not seeking a monetary reward. You're seeking some type of injunctive relief. For example, you want job reinstatement, or you want your employer to do antiharassment training or something like that to correct the behavior that's going on.

Again, the ranges are very broad. What I would encourage you to do is go see an experienced employment lawyer in Phoenix. Sit down with a lawyer, let them go through the facts of your case, and help them determine what the proper value of that case may be. In some cases, you have to wait and see what a jury decides.

Can I Make My Employer Give a Reference?



I recently had a client contact me because they wanted an employment reference. They were applying for a position and the job that they were applying for, was trying to contact their former employer to find out information about whether or not they worked there, what their position was, and whether or not they were a good employee. They were upset that that employer didn't provide those details.

One thing that I will tell you, as an employment lawyer, is that we often recommend that employers don't provide all of those details. Employers are concerned that they could face defamation charges or something like that, if they provide too much information or negative information that could cause problems down the road for that employee.

Employers are not required to provide references. What most employers do, they will confirm the dates of employment and the position held, and sometimes they will confirm whether or not you're eligible for re-hire. Other than that, most employers won't provide more detail than that.

What Are the Employment Damage Limits?

Recently, on talking to a client, he had spoken with a lawyer previously that on a basic Title 7 claim (race discrimination claim) was going to go sue an employer for $2.5 million because someone called him an expletive and he was still employed there. I immediately looked at the client, and of course without bad-mouthing another attorney, I advised him quickly that he had come to the right place. Any experienced lawyer in that type of law would know you're probably

not going to sue someone for $2.5 million for just an expletive you've been called based on race.

In fact, the law restricts it. They have what we called caps. You can only pursue claims up to a certain amount. Generally, the threshold for most EEOC claims is $300,000 generally if that person has the max number of employees under the law; the fewer the employees, the lower the caps. Again, there's an analysis that goes into that but generally the cap is $300,000 for compensatory damages.

Now of course, there are special damages and punitive damages and other things that weigh into it, but in most cases when you EEOC sues an employer and gets $4.5 million, nine times out of ten that wasn't for one person; it was for a class of people. Whatever those damages were, were split up between numerous parties. There are caps that are on every case that comes before the EEOC.

A lawyer will sit down with you, discover with you what those caps are, where they feel your case fit within those caps, how much damage you can get. Remember, it's compensatory damage. It's make-whole relief; it's not get-rich relief. If the matter proceeds to court, the jury can award punitive damages considering on the egregiousness of the crime.

What If I'm Fired for Reporting Harassment or Discrimination?

One of the biggest concerns that our clients have is what happens after they make a complaint of harassment or discrimination. Our clients are concerned that the employer is going to turn around and take some type of action against them; they're going to discipline them; they're going to write them up. They could ultimately fire them for reporting some type of discriminatory conduct.

What I would say to you and what I say to our clients is that there are provisions in the law, anti-retaliation provisions in the law that prevent employers from taking retaliatory action against an employee for engaging in any type of protected activity. Protected activity can be opposition conduct, like opposing discrimination, or it can be participation conduct. For example, you participate in some type of internal or external investigation.

Hostile Work Environment

I recently had a client contact me and tell me that they felt like they were in a hostile work environment. Now, a hostile work environment is a term that is often misused. People don't understand what that means. For example, if you're called a bad name one time, or your supervisor picks on you because you're not getting your work done on time, or even a couple of one-off comments here and there. That's not necessarily a hostile work environment. To be a hostile work environment, there has to be conduct that, defined by the law, is substantially severe or pervasive, to alter the terms and conditions of your employment. That is a very high standard to reach.

What If HR Ignored Your Complaint?

In most cases, when we have contact with clients who bring claims of employment discrimination, more often than not, there's a thread in that claim that says they reported this claim to Human Resources, supervisor, or lead representative and nothing was done. This is very important to understand because oftentimes (if you don't have a grasp of the law) you don't understand who's in that chain of command, that can enact liability upon the employer. Can reporting the information to a lead result in liability for the employer, or a front-line supervisor, or a manager, or does it have to be HR? Does it have to be some upper-level executive?

These are all questions that an experienced lawyer could answer for you concerning the EEOC law. The broad answer to that is that notice is duty to act. Once the employer has notice of some claim of discrimination, once they have notice of it, there is a duty to act to protect, and prevent further discriminatory acts. That's the broad standard. They have to act appropriately and immediately to prevent further discriminatory acts, whatever that is.

Again, that's why you need to sit with a lawyer to determine if it was immediate corrective action to prevent such discrimination. Your front-line supervisor would certainly meet that qualification. They're an agent of the employer. Your manager would meet that definition. Human Resources obviously would. Sometimes even a coach on the front line. Do they have input in your evaluations? Can they tell you when to go to lunch and when to come back? If they

have that level of authority, reporting it to a senior representative or a coach could enact that notice as a duty to act requirement.

Again, you would want to sit with an attorney that would look at that and determine if there's enough involvement by that particular individual. One thing that you must make sure that you do is follow the company's processes. Not following the company's processes could literally blow the bottom out of your claim because you didn't follow the process. If it could be proven that if you would have followed the process, you would have prevented all of the harm, it could take the merit away from your claim. If you're in the process of that, of course, I would always urge you to contact a lawyer before things go badly. If you're already through that process and you're not working there anymore, but you just want someone to look at the facts of that case and determine where the claims are, or you're ready to file that charge of discrimination, I would certainly urge you to contact a lawyer, so that we can make sure that your charge is drafted the way it needs to be drafted.

If you put them on notice about it, and things keep happening, then that increases the chance that they'll be held liable for that particular conduct. They have to act. They must take immediate corrective and appropriate action to prevent further discrimination and to look into your claims regardless of the merit that they think they may have. They have an obligation to do so. That's not only Human Resources; that is everyone in the management chain or that has control over the work. Again, that's a broad answer, but an experienced attorney will really dig down into it and make sure that your claim is handled properly.

What If the Male Employees Are Being Paid More?

Recent times have led to an increase of female employees voicing concerns regarding differences not only in treatment but particularly differences in pay. Many female employees who have like and/or similar qualifications to their male counterparts are being paid less than people who are doing the same job who happen to be male. We run into that quite often here. There is a law that protects you: The

Equal Pay Act, and even some provisions under Title VII that could particularly protect women, the Lilly Ledbetter Act, and other acts that have recently been passed by our legislature and presidents. You would want to sit and talk with a lawyer about this because there is a detailed analysis. There's a lot of forensic evidence and data that needs to be compiled because it could not only be you, it could be a history that employer has. I've seen it more than once where an employer has a history of paying women less.

Of course, this is violative of our laws. It should not be so and you would want to pursue that in these United States of America under the laws that have been provided to us. It is wholly against the law to pay a woman less simply because she's a woman when she has like, similar, equal qualifications, and experience. You would want an experienced lawyer to look at that with you. Oftentimes, there are claims of actions. It's not something that you should turn a blind eye to.

Can I Get a Medical Condition Accommodation?

We often get calls from potential clients about their disability and whether or not their employer was obligated to accommodate them under the Americans with Disabilities Act. Under the Americans with Disabilities Act, your employer is required to provide a reasonable accommodation so long as it does not create an undue hardship on that employer. The type of accommodation that they have to provide often depends on a large number of factors. One can be the size of the company and how much money the company has. Another can be the type of position. If you're in one of those positions where you feel like you need a reasonable accommodation, ask for it. If they decline to provide it, then contact an employment lawyer here in Phoenix, Arizona.

What Do I Do About Pregnancy Discrimination?

We recently had a client come to us in regards to issues involving her employment and her being pregnant. This on its face really is one of those areas of employment's law and coverage that really needs a watchful eye and an experienced hand of an attorney that's familiar with this kind of law. Some of the questions that she began to ask was, "Well, is this covered under my disability? I have pre-eclampsia." Of course, ladies know that's high blood pressure that's associated with a pregnancy. She was asking about a disability claim. What

you'll understand about the Pregnancy Discrimination Act is it's not a product of the Americans with Disability Act, the ADA. It's a product of Title VII of the Civil Rights Act of 1964, which is discrimination based on sex. That's because males can't get pregnant, so there's a certain set of criteria out of the Pregnancy Discrimination Act that requires that employers handle women who are with child a certain way.

There are claims that can arise under the ADA if there are complications with the pregnancy as of such that would warrant and/or meet the Americans with Disabilities Act. Again, it's a very detailed analysis. There are questions that have to be answered as it relates to pregnancy. What happens when you need time off? What about doctors' appointments after you birth the child? What if the child has issues after birth? What if you have issues after the birth of the child? Where does Family Medical Leave Act play a role in the whole process? These are all questions that need to be answered by an attorney who's experienced in that area that would represent your interests that would look into things.

Oftentimes, employers aren't as forthright as they should be in that area because of course, they want people at work. Then again, the EEOC is a third-party neutral agency. They can only look at the facts from a neutral perspective that is submitted to them. If you are dealing with pregnancy issues and you have some concerns about your appointments, about some of the conditions that are associated with your pregnancy, and what your rights are under the appropriate laws, I would highly advise that you contact an experienced Phoenix attorney that deals and that has dealt in the area of Title VII and the Pregnancy Discrimination Act to make sure that your rights are adequately pursued.

Can I Sue for Workplace Discipline?

Recently, in speaking with a client, they began to express to me how they felt like the discipline standards were different between them and other employees. How they felt like the employer didn't follow the employment manual as it relates to them. They happen to be a different race than the other employees who were treated differently from them. Oftentimes, this results in a cause of action under Title VII. It could be one of the other laws that are covered by the EEOC. Broadly speaking, when there is an employment manual, a standard practice, a procedure that is set in place, the law calls it progressive disciplinary

policy, it must be followed. There should not be any difference or abatement of that policy, or discriminatory if you will, or disparate impact, or treatment concerning that policy as it relates to people who are outside of that protected group.

In other words, for example, I can't take all of the Latinos and skip the steps to firing them. If they're Latinos, they cannot go straight from a written warning to direct termination. Whereas, all the other employees, they get a verbal warning, a written warning, a final written warning, a second final written warning, and then termination. Where there is inequity in the policy, there's been disparate treatment there. If there is a policy in place, a progressive disciplinary policy that has been put in place by the employer, an experienced attorney would look at that policy, analyze that policy, and make sure that the application of that policy has been for lack of better words, even-handed, implemented on persons within your protected category, your protected race, and outside, and making sure that there was no difference in the implication or the application, of this particular policy.

Causes of action I should say, often arise out of that implementing those policies in different ways. You will need to talk to a lawyer, so they can analyze the policy, get the necessary information. From the Freedom of Information Act, request the files from the employer. Look at all of the employees and determine that maybe you were treated differently. Again, that is the bedrock. It is that subjective treatment that is the bedrock of discriminatory action. You would want to talk to a lawyer and express those concerns to the EEOC to make sure that those claims are addressed under the applicable law.

Questions About Sexual Harassment

What Should I Do About Unwanted Sexual Advances?

One of our clients contacted us recently because she was subjected to unwelcome sexual remarks in the workplace. Some of the comments were being made by her general manager. The comments were very inappropriate. They were very sexual in nature. She didn't know what to do. She recorded some of those conversations, which is very helpful when we're pursuing the case in

court, but it didn't put an end to it. She went to HR. She complained. HR didn't act because of the high level of this particular employee. What I would recommend, if you experience any unwelcome sexual remarks, or sexual comments, or even sexual advances at work, is to contact an experienced employment lawyer in Phoenix, Arizona to help.

What If I Was Sexually Harassment by a Manager?

Recently, I was speaking with an individual that felt like they had been harassed by their manager in their place of employment. One of the things that I began to explain to them is that harassment in all of its forms, harassment comes from a manager it has a little different analysis than it does when it comes from a coworker; whether it's sexual harassment, or religious harassment, or harassment based on race, or even someone teasing you about a disability you may have. Again, the coworker harassment requires that the employer know or should have known that the harassment was taking place. If the employer knew or should have known that the harassment was taking place and they did not take immediate and appropriate corrective action to cure it, then it could result in a cause finding and that employer could be held liable for that harassment.

When it comes down to supervisors and managers, there must be what the law refers to as tangible employment action. Again, this is where you would need the hands of a skilled lawyer that's skilled in this particular law to look at this. Tangible employment action requires that there was some alteration, something shifted about your employment. They cut your pay. They cut your hours. They moved you to another place in the building. Something happened as a result of your claim of discrimination or harassment by a particular manager. If that tangible employment action is causally linked to the harassment then there would generally be a finding, a cause finding at the EEOC or there would be a violation of the law.

Again, if you have a tangible employment action and that action is causally linked to that tangible employment action, to that harassment, then there

would generally be cause finding under the law. If there is no connection, then the question would be, did the employer, human resources, or whomever, take a care to correct the harassment to prevent that manager from harassing you again? If they did so, and the person that has been harassed followed the processes did everything that they were supposed to do, and all of the harm would have been avoided if they followed the processes, then generally there wouldn't be a finding under the law. If the employer did not take the proper care, then generally there would be a finding under the law.

What If I Was Sexually Harassed by the Owner of the Company?

Recently, I was dealing with a case where a young lady had been harassed by the owner of a corporation. She wanted to know what her remedies were. As she began to tell me the story, she became nervous. She said, "Well, I feel nervous because I didn't report it to Human Resources. I didn't tell my manager about it because this was the owner of the corporation that was sexually harassing me." She waited an extended period of time. Luckily, she was still within the statute of limitations, but she felt like she had no option. She felt like she had no recourse.

After sitting with our legal team here at Smith & Green, we were able to point out to her that the analysis is different. It's not the same as it is with a coworker. It's not the same as it is with a supervisor. When it's someone that's that high up on the food chain, where you feel like there is no reasonable opportunity or there's no one else to report it to, it starts to fall into what we call an alter ego analysis. In other words, where you're so high up on the food chain for lack of better words, that there really is no one else to go to. There feels like there is no reasonable means of supporting it.

With that particular young lady and many others that feel like they've been harassed by owners or by people that are so high up to where there's nowhere else to go, then it could fall under an alter ego analysis. There's some analysis under the law that the attorney will look at with you to qualify that as alter ego analysis and harassment, which is liability per say. The employer's always liable for alter ego, president, owner, someone that high up on the food chain.

It's a little easier to get there because there was no reasonable recourse. You would want to sit and talk with a lawyer about that so they could analyze the facts of your case regarding that analysis.

About the Authors

Quacy L. Smith

Dr. Quacy Smith is a founding partner of Smith & Green who serves as the Office Managing Shareholder of our Arizona operations. He also serves as the CEO/Chairman of the Board of Directors. His legal prowess and corporate experience has proven to be invaluable to Smith & Green, as well as our diverse clientele.

Graduating from Phoenix School of Law with a juris doctorate in 2013, Quacy is admitted to practice in the state of Arizona and the United States District Court for the District of Arizona.

Dr. Quacy L. Smith is actively involved in the leadership of his church and community. He is a highly sought-after public speaker. He resides in Litchfield Park, Arizona with his wife and their children.

James M. Green

James M. Green primarily focuses on labor and employment law; however, he has expanded his practice to include other areas of law, including family law, and personal injury.

After working with the United States Air Force for eight years, he graduated from Arizona State University Sandra Day O'Connor College of Law with a juris doctorate in 2015. James is admitted to practice in the state of Arizona and the United States District Court for the District of Arizona.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