

Top 15 Things New Employment Lawyers Need To Know

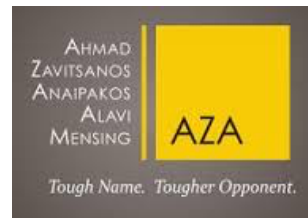
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Our Perspectives

- Joe
- Amy
- Ed and Mark

No. 1 Thing to Know For A New Plaintiff's Employment Lawyer

Know the controlling law inside and out, and don't try to fight it (except in very rare circumstances).

As a corollary: generally don't take "close cases" or cases "in the gray area," especially on the question of pretext. Employees tend to lose those.*

* Unless you are in the 9th Circuit 😊

No. 2 Thing To Know For A New Plaintiff's Employment Lawyer

Vet cases and clients very carefully.

- Criminal records
- Bankruptcy
- Social Media
- Prior employment history
- Prior Suits
- Arbitration agreement
- Mitigation efforts
- Audio recordings
- Obligation to preserve evidence (and gather it up front, and on a continuing basis)
- Return of Company property.
- Return of confidential info.

And, trust your instincts.

The plaintiff is critical. Only take their case if they have at least some redeeming quality you can leverage (unless that makes no difference at all (*e.g.*, FLSA cases)).

An Aside: Thoughts on Retainers

- Some say it ensures the plaintiff has “skin in the game.”
- Others don’t take any money from plaintiffs, based on the reasoning:
 - Avoid potential perception of wrongdoing.
 - Demonstrates to opponent confidence in case and that you are successful, and not looking to just “keep the lights on.”
 - Makes it a lot easier to have a clean break, if you need or want to get out.

No. 3 Thing To Know For A New Plaintiff's Employment Lawyer

Don't forget to explain the entire litigation process to the potential client and emphasize:

- (a) the potentially long time frame before there is any resolution;
- (b) the need for their consistent cooperation and involvement.
- (c) the potentially invasive discovery they may have to endure.
- (d) the fact that any lies they tell (or have told) will be revealed, so **DO NOT LIE. EVER.**

It is not usually, "sue today, pick up a check tomorrow."

No. 4 Thing To Know For A New Plaintiff's Employment Lawyer

Control the narrative throughout the case, and maintain a consistent theme throughout, that you build from start to finish.

The idea is that, by the time you get to trial, your case will be a completely coherent, cohesive, unstoppable juggernaut that essentially tries itself.

But also strongly consider giving the defendant a fair opportunity to understand your allegations and provide a response before you initiate any action, and seriously consider their response.

It will help you avoid taking bad cases, and usually make your good cases even better (examples abound).

No. 5 Thing To Know For A New Plaintiff's Employment Lawyer

Don't take cases just to settle them for nuisance value. Bad things happen, and it creates a downward cycle.

- damage to your reputation.
- unhappy clients.
- lose ability to identify truly valuable cases.
- lose credibility with courts / judges.

No. 6 Thing To Know For A New Plaintiff's Employment Lawyer

If you send a "demand" or pre-suit letter, make it special and impressive, not a form-based blob.

The same goes for your original complaint – make it special.

This is a key separator to the employer's in-house counsel, outside counsel, courts, mediators, etc.

Stand out in a good way. Show command of the facts, the law, and a show-person's flair.

No. 7 Thing To Know For A New Plaintiff's Employment Lawyer

Gather evidence before you sue, including affidavits from witnesses.

- text messages
- e-mails
- affidavits and declarations
- public information / internet / 10-Ks
- ECF/PACER

No. 8 Thing To Know For A New Plaintiff's Employment Lawyer

Consider having your client swear under oath to the truth of the allegations in the lawsuit.

- Helps avoid the “sham affidavit” drama.
- A good quality control mechanism.
- A legit way out if you later learn that they outright lied to you (sadly, that happens some times, despite all the warnings).

No. 9 Thing To Know For A New Plaintiff's Employment Lawyer

If it turns out your client's case is really and truly without merit, take appropriate and ethical action immediately, no matter what.

- Avoid possible sanctions.
- Ethically right thing to do.
- Win respect from the defense bar and courts.
- The message you send then becomes: if attorney _____ took that case, and is continuing to pursue it, then it most likely has significant merit.

No. 10 Thing To Know For A New Plaintiff's Employment Lawyer

Send case-specific discovery promptly, answer discovery promptly, take necessary depositions, prepare your client well for their deposition, and do an A+ job in all respects.

- If you treat your cases as commoditized goods, you will get commoditized settlements.

- If you treat your cases like rare and special jewels, you will attract different settlement offers.

No. 11 Thing To Know For A New Plaintiff's Employment Lawyer

Stay in regular communications with your client, and clearly and repeatedly modulate reasonable expectations at appropriate times.

- You learn more every time you talk to them.
- They need to hear things over and over to absorb them.
- They call it the A-C relationship because it is a relationship. Treat it that way.

No. 12 Thing To Know For A New Plaintiff's Employment Lawyer

Be reasonable in settlement negotiations, but do not settle cheap. Especially if you have a truly compelling plaintiff.

Be impressive in mediation – in full command of the facts, the law, and put on a polished, powerful, yet professional, presentation. You are being evaluated as an advocate.

But, be clear that you are not “begging for a settlement” and that if the Company does not want to settle, you respect that and welcome going forward.

Do not get mad if they don't want to settle.

No. 12-A

Try your great cases – the ones you know you will win.

- Try them unless you get full value, or the client wants to take less.
- Winning verdicts is a way to get larger settlements in future cases.
- For all the saber-rattling, in the end, from time to time, you have to prove you can actually do it.

No. 13 Thing To Know For A New Plaintiff's Employment Lawyer

Be (super) prepared for trial at least a month in advance of the trial date.

Remember, the defendant is typically looking at winning on SJ, but you have to win at trial.

So, keep your eyes on the prize – the trial – from the start, without overlooking SJ.

Note: Trial Brief Tip.

No. 14 Thing To Know For A New Plaintiff's Employment Lawyer

Make sure everything you file with a court is completely honest, and substantively outstanding.

Out brief the other side on the law and the facts. This does not assure you will win, but it increases the odds, and wins respect – especially as a plaintiff's lawyer.

Pick a couple controlling cases that you consistently rely on as fitting your case. Beat that drum regularly.

No. 15 Thing To Know For A New Plaintiff's Employment Lawyer

Don't demonize your opponent (either the employer or its lawyers) in your mind, and then allow that to color your decisions, or creep into "ad hominem attack style" briefing.

Corollary no. 1: Always stay calm and in control of your emotions. Even when showing emotion, do it strategically. Never really lose your cool.

Corollary no. 2: Understand your opponent's motivation. They are usually just doing a job.

Bonus Tips For New Plaintiff's Employment Lawyers

Bonus tip No. 1: Do the right thing, every time, no matter what, irrespective of any financial consequences to you, or anything else.

Bonus tip No. 2: Look for cases that don't turn on proving illegal motive (*e.g.*, FMLA interference claims, some ADA claims, FLSA claims, etc.).

No. 1 Thing To Know For A New Defense Lawyer

In discrimination cases, it is largely about summary judgment.

So, learn the facts, inside and out. Review the documents and interview the witnesses.

And, read all the published Fifth Circuit summary judgment cases - going both ways -in the last 10 years+, and know them inside out. Plus the U.S. Supreme Court and Texas Supreme Court big employment cases.

No. 2 Thing To Know For A New Defense Lawyer

Create and develop a summary judgment motion as you do your case assessment, review documents, gather witness statements, do discovery, and prepare for the plaintiff's deposition. That way:

- When you depose the plaintiff, you will know exactly what you need to get out of them, for your MSJ.
- By the time you depose the plaintiff, and use their testimony to fill in the rest of the motion, it will essentially be done and ready to file.
- You won't be scrambling around trying to put the whole thing together in a short period of time.

No. 3 Thing To Know For A New Defense Lawyer

Explicitly incorporate winning legal standards from the case law into your deposition questions. For example:

- “You ultimately assert and agree that your discrimination case rests solely on your own – strongly held – subjective belief, correct?”
- You agree that a full and fair characterization of your mental anguish resulting from your termination is “hurt feelings, anger, and frustration, true?”
- Create these sorts of lines of questions to ask in every plaintiff’s deposition.

No. 4 Thing To Know For A New Defense Lawyer

In summary judgment briefing:

- Try to mostly rely on the plaintiff's own testimony and evidence.
- Don't lose credibility by making every possible argument under the sun (this is sort of the flip side of the plaintiff's lawyer who pleads every possible claim, including IIED).
- Instead, generally, make only the really clearly winning arguments.

No. 5 Thing To Know For A New Defense Lawyer

Engage your client, keep them up to date, and show you are adding value through:

- Early, reliable, and realistic case assessments, even including the “bad news” when it is necessary.
- An early budget if requested or needed.
- Early agreed litigation / settlement strategy aligned with the client’s goals.
- Regularly scheduled case and budget updates.

No. 6
Thing To
Know For
A New
Defense
Lawyer

Be more to your client than just a litigator.

Make yourself an indispensable problem solver and recognized thought leader, *ie.*, “the wise person” whose judgment they respect more than any other outside counsel.

If you do that, your client relationships will both expand and become closer, your business will grow, you will get referrals, and your career will flourish.

No. 7 Thing To Know For A New Defense Lawyer

- Think long-term. Do not try to squeeze out every billable hour from your client that you can.
- Instead, show your willingness to invest your time – at no charge – to learn your client’s business, their industry, their culture, and even do some legal work, etc.
- Give your client value-add “freebies,” such as Firm newsletters, CLE invitations, free or discounted on-site employee/management training (by you) to build and deepen your bond.

No. 8 Thing To Know For A New Defense Lawyer

Become a recognized, leading expert in one or more subject or industry, in and outside of your law firm.

- Oil and gas is an obvious industry in Texas. Clients love to know the “best practices” in their industry. If you bring that to the table, that is highly valuable.
- Could be wage and hour law in oil and gas industry (or some other).
- Could also be labor law/unions, drug testing, privacy, background checks, ERISA, OFCCP, independent contractors, SOX, Dodd-Frank, covenants not to compete, trade secrets, OSHA, FMLA/ADA, WARN, etc.

No. 9 Thing To Know For A New Defense Lawyer

If you are at a Firm where you want to make partner one day, remember this: when it's time to vote on you for partner, not one client will be in the room.

- So, that means you really have another client – the partners at your law firm. You should impress them every day with your unrelenting work ethic, work product, creativity, and positive attitude.
- Don't look for ways to get out of work. Instead, look for ways to do the work. To put the load on your back and carry it through to the end in a powerful, polished, and professional fashion.
- Demonstrate that you are a team player, get along well with your other Associates, and put the client and Firm first.
- Write down all your time.

No. 10 Thing To Know For A New Defense Lawyer

You will develop a reputation quickly at your firm, so remember:

- We are in a deadline business, and if you miss a deadline you will probably never do anything for that partner or client again. Be super responsive.
- As an associate, understand that there is no such thing as an irrelevant, inconsequential mistake. Even a typo can negatively impact how you are perceived. You will need to own your mistakes and demonstrate you will fix them going forward.
- There is no such thing as a request from a partner or a client that you can ignore.
- You have no idea how much partners value good associates, and detest bad ones.
- Get to know Associates in your section and in other sections of the Firm. They may one day be great referral sources.

No. 11 Thing To Know For A New Defense Lawyer

Being a good lawyer is hard. It requires you to work a lot – including nights and weekends. Yet, at the same time, to maintain high levels of energy and intellectual performance.

Condition your mind and body to regularly simply outwork the other side.

Preparation is key. Be better prepared than your opposing counsel, even if you can't – or shouldn't – bill for every minute of the preparation.

Develop these habits early and often, and it will become easier to do them. Otherwise, you are setting yourself up for failure.

No. 12 Thing To Know For A New Defense Lawyer

- Foster and maintain a good relationship with your opposing counsel. The truth of the matter is that is to your client's benefit for a range of reasons (avoiding discovery squabbles, scheduling depositions, making trial easier for both sides and the court, settlement, etc.) and saves your client money.

No. 13 Thing To Know For A New Defense Lawyer

- Stay up to date with government enforcement actions and significant verdicts that could impact your clients, and ensure that your clients are provided the relevant teaching points that come out of them. This will help make you a more valued and trusted counselor.
- As noted above, just being a litigator – even a really good one – is not enough. You have to do the extra things to become your clients’ truly trusted advisor and go to counsel.

No. 14 Thing To Know For A New Defense Lawyer

- Don't let efficiency or other immediate needs (like meeting your billable hour requirements) override the importance of mastery of the law, the facts of the case, and your professional development – even if that means you cannot bill for all your time.

No. 15
Thing To
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A New
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- Learn not to be afraid to answer clients' questions directly and with unvarnished honesty (although tactfully). They will actually learn to appreciate it in the long run.

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