The HR Workplace Audit

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A workplace audit is the first step in improving a company's human resources department. It allows a company to evaluate its current policies and practices to identify weaknesses or areas out of compliance.

This outline will serve as a guide to systematically review a company's pre-employment, employment, post-employment, and other miscellaneous processes. The outline focuses on various employment and statutory compliance related issues as well as provides an overview of human resources' basic functions. It also sets forth a summary of the issues most companies face and provides suggestions as to how to deal with them.

If, after the audit, a company identifies any "problem areas," this outline can assist in creating solutions. With the help of an attorney, a workplace audit will help companies improve their policies and practices to ensure compliance with applicable rules and regulations and help protect the company from and, in the event of, litigation.

I. PRE-EMPLOYMENT

A. Solicitation of Applicants and the Application For Employment

Generally speaking, companies should establish a formal recruitment process. This will insure compliance with the applicable laws and proper documentation in the event a claim is brought against the company.

First, companies must put a process in place to record the receipt of applications/resumes. This will enable companies to properly defend any claims that arise in the context of the recruitment for a given position or positions. Resumes/applications should come to a central person; managers should not be permitted to engage in the recruitment process without prior involvement by the human resources department. Then, the received resumes/applications can be screened to see if the candidates have the basic qualifications. If they do, copies of the resumes/applications can be forwarded to other managers for review and consideration; those that do not meet the basic qualifications or have another non-discriminatory disqualifier should be labeled as such.

Once the managers conduct their review, the resumes for any candidates that they do not wish to interview should be returned to the appropriate human resources representative with an indication of the reason for the decision not to interview. Those who are selected for interviews should be interviewed and – at that time – complete the Application For Employment (discussed below). Once a candidate is selected for employment, the balance of the resumes and Applications For Employment of those not selected should be returned to the appropriate human resources representative with an indication as to the reason for non-selection. The selected candidate's resume and Application For Employment should also be returned to the same representative and it should be maintained in the candidate's employment file (if they accept the offer of employment) or retained with the other candidates' records (if they decline the offer

of employment). A copy of the resume/application and Application For Employment of the successful candidate that accepts the position should be placed with the balance of the recruiting records for that position. At the end of the recruiting process for a specific position, the records related to that search should be compiled and maintained together and retained by the company.

Second, when conducting the initial screen of the applications, care should be taken so that applicants are only excluded from consideration based on objective, non-discriminatory criteria. For example, similar criteria should be used in excluding applications (*e.g.*, all non-completed applications should be excluded from subsequent consideration; however, it would obviously be improper to exclude females as a class for warehouse positions based solely on the fact that they are females). Those screening applications should be apprised of the proper and improper criteria for screening applications; this issue is discussed in more detail in Section I.B. below.

Third, companies should endeavor to use an Application For Employment for all positions whether or not the applicant provides a resume. Companies should, if practical, require that the candidate complete the Application For Employment while at the office; this will assure that the candidate can read and write and follow basic instructions. It is also important that the candidate completes the Application For Employment in its entirety. If the candidate does not know certain information, request that they provide it, in writing, as soon as possible. This information, when obtained, should be appended to the Application For Employment. Companies should also have every applicant personally sign their resume so that it can be in a position of using that acknowledgement to its advantage should it become involved in any litigation with that individual.

The Application For Employment for any applicant who is hired should, along with any related interview or other recruiting documentation (*e.g.*, resume), be placed in the employee's personnel file. (*See* discussion below in Section II.M. regarding personnel files).

Companies should have their Application For Employment reviewed to make sure it complies with applicable law.

B. Inquiries During An Interview and Background Checks

It is important that everyone participating in the interview process has received proper training and "bushes up" on the appropriate do's and don'ts of recruitment. As a general rule, questions that an employer is prohibited from asking on the employment application (*i.e.*, questions about race, sex, disability/handicap, workers' compensation history, national origin, religion, etc.) also are prohibited during the interview process.

Reference and background checks are a helpful tool in the recruitment process, but employers who use these tools should take the following steps. First, if a company is going to do reference checks it should do them for all employees in the same or similar job classification. The failure to act uniformly in conducting reference checks may give rise to claims of discrimination, among others.

Second, when conducting reference checks, a company may be faced with former employers who are either reluctant or unwilling to provide any information on a candidate – regardless of the candidate's authorization for the disclosure of information from a prior employer – other than name, dates of employment, position(s), and confirming compensation (and, possibly, benefits). On this point, the company should ask whether the candidate in question is "eligible to be rehired," which may provide an alternative inquiry that may ultimately give it an indication as to the "employability" of the individual. The benefit of this inquiry is that it allows a former employer to respond with a simple "yes" or "no"; in doing so, provided the response is accurate and truthful, and the former employer can virtually insulate itself from a defamation claim brought by the former employee. In addition to using this tool as part of its recruitment process, an employer may want to use this tool when providing references after an employee's employment terminates. (*See* Section III.B. below).

Third, should a company utilize the services of an outside agency to conduct employee background investigations (including credit and criminal background checks), be aware that these searches are governed by the Fair Credit Reporting Act ("FCRA"), and the company has additional obligations under the FCRA. Generally speaking, the FCRA is designed to promote accuracy, fairness, and privacy of information in the files of every "consumer reporting agency" ("CRA"). Most CRAs are credit bureaus that gather and sell information about individuals -- such as if that individual pays his/her bills on time or has filed bankruptcy -- to creditors, employers, landlords, and other businesses. There are additional limitations on private entities and their conducting criminal background checks.

In order to properly utilize information from a CRA, a company must make certain pre-investigatory disclosures to an applicant/employee and receive written authorization to conduct the investigation. Additionally, once the investigation results are conveyed to the employer by the CRA, the company – depending upon what action it is going to take as a result of the information disclosed to it by the CRA – may have further notice obligations to the applicant. It should be noted that while the FCRA is normally referred to in connection with credit bureaus, other entities may fall within the definition of a CRA. A company is well advised to have their FCRA forms reviewed to ensure compliance.

As noted above, the interview process, including reference and background checks, will result in the generation of various documents including, but not limited to, interviewer and background check notes. These documents should be returned to the appropriate human resources representative so that an accurate and complete record of the applicant selection process may be maintained. Once a company decides to make an offer of employment to an applicant (*See* Section I.D. below), all information related to the search for that position should be maintained together. This includes all of the information that is generated through the interview and background check, as well as all of the information that is collected in Section I.A. above. The collection of information and documentation should be reviewed by the appropriate human resources representative and then maintained, along with the record of or cross-reference to the applicant that was offered the position.

C. Pre-Employment Testing

The Equal Employment Opportunity Commission ("EEOC") has promulgated Uniform Guidelines on Employee Selection Procedures, concerning the use of pre-employment tests. Employee selection procedures that have an adverse impact on minorities may be attacked under the discrimination laws as illegal discrimination. The Guidelines address the issue of such pre-employment tests.

In short, the Guidelines make it very difficult for employers to use structured tests of any kind in the pre-employment selection process. The Guidelines require that any test that has an adverse impact on minorities be "validated;" that is, the test must be demonstrated to be job-related. In most cases, typing skills and counting tests appear to be job- related for clerical employees and, accordingly, satisfy the regulatory requirements. Nevertheless, if the tests have an adverse impact upon minority applicants, a company would need to review the questions asked and skills tested with an eye toward determining whether each skill and/or question is necessary for the job in question.

Should a company decide to implement pre-employment testing, an attorney should confirm that the tests have, in fact, been validated (such that they fit within the EEOC Guidelines) and the company should obtain something, to that effect, in writing. Finally, any records pertaining to any pre-employment testing should be maintained in the employee personnel files. (*See* discussion below in Section II.M. regarding personnel files).

D. Offer Letters and Confidentiality/Non-Solicitation Agreements and Covenants Not To Compete

Depending upon the nature of the position in question, offer letters take many forms. If the company's intent is to preserve the "at-will" nature of employment, the offer letter should avoid language that could imply a durational term and should quote salary figures in weekly or monthly, rather than annual terms, if appropriate. The offer letter may also set forth a contractual disclaimer similar to that appearing on an application for employment or in the introduction to an employee handbook. If, on the other hand, the employer's intent is to enter into a contract, the offer language should be much clearer and more specific.

Companies should use a form of offer letter for all positions. The use of offer letters will enable them to set forth their intent on the "at-will" nature of the employment relationship and will set forth certain basic information including compensation and benefits. Doing so will avoid disputes in the future about what was and was not promised. Additionally, the offer letter can make reference to any confidentiality, non-solicitation agreement and/or covenant not to compete.

While confidentiality agreements are frequently enforced by courts - provided the information sought to be protected is, in fact, proprietary and confidential business information - some courts frown on the enforceability of non-solicitation agreements and covenants not to compete. Accordingly, it is critical to evaluate the need for such agreements and carefully tailor them such that they will be enforceable in the

jurisdiction in question. Certain positions would benefit from the use of an employee confidentiality, non-solicitation agreement and covenant not to compete. An attorney can review and possibly expand a company's current form of agreement(s) in this regard.

As with other employment-related documents, any offer letter and/or confidentiality, non-solicitation agreement and/or covenant not to compete should also be kept in the employee's personnel file. (*See* discussion below in Section II.M. regarding personnel files).

II. DURING EMPLOYMENT

A. Immigration Form I-9

All employers must comply with the Immigration Reform and Control Act of 1986 by requiring employees to complete and verify the Form I-9. The following points regarding the Form I-9 should be noted: (1) the Form I-9 must be retained for three years after the date the person begins work or one year after the person's employment is terminated, whichever is later, and (2) the company must retain the Form I-9s and any supporting documentation in a file separate from the employee's personnel file.

Employers must obtain completed I-9s from all new employees within three days of employment. Companies should also conduct a periodic review of all I-9s to confirm that they have all been properly completed. To the extent that there are any issues with any of the I-9s, the company should contact an attorney, and determine the proper manner to rectify any deficiency found. Once an employee leaves a company's employ, the I-9 should be removed from the I-9 "binder" or file and stapled to the outside of the personnel file and maintained along with any medical file. (*See* discussion below in Section II.M. regarding personnel files).

Additionally, the Form I-9 is to be made available for inspection by officials of the U.S. Citizenship and Immigration Services, the Department of Homeland Security, employees from the Immigrant and Employee Rights Section (IER) at the Department of Justice, and employees from the Department of Labor upon request.

B. New Hire Reporting

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 includes a requirement for all employers to report certain information on their newly hired employees to a designated state agency. New hire reporting is designed to, among other things, increase child support collections from parents. Most states have implemented a mechanism for complying with the Act.

Additionally, every company should, regardless of whether they use an outside payroll vendor or they do their payroll internally, maintain copies of documentation illustrating their compliance with the new hire reporting in the employee personnel files. (*See* discussion below in Section II.M. regarding personnel files).

C. Employee Handbook

It is important that every employer have a well-drafted and implemented employee handbook. Sound policies and procedures inform and facilitate communication with employees, promote retention, and minimize legal exposure and cost. Ultimately, an attorney should review employee handbooks as a "first-line" of defense to claims that are frequently brought by both current and former employees. As there is no bright-line test to guide an employer in determining the appropriate content of its employee handbook, and given the complex web of state and federal laws that can impact employer policy, careful consideration needs to be given to the content of the employee handbook. Additionally, depending upon the employer's goals, the employee handbook can take a number of forms.

The employee handbook normally includes all of an employer's current employment policies and work rules and any modifications thereto. The employee handbook would discuss, among other items, the at-will nature of the employment relationship, employment classifications, hours of work, time records, overtime, family and medical leave, jury duty, and anti-harassment. Furthermore, there are certain disclaimers that should be included in every employee handbook, as well as an acknowledgement page for signature by the employees. The acknowledgement page should be maintained in the employees' personnel files. (*See* discussion below in Section II.M. regarding personnel files). Companies should work with an attorney on reviewing and revising, if necessary, their employee handbook.

When distributing an employee handbook to employees, it is also generally advisable to hold some form of question and answer or review session with employees so that they can raise issues related to the employee handbook. Training sessions with supervisors/management to educate employees as to what they should or are required to do in connection with the various policies are also recommended. These educational sessions should be in addition to the harassment avoidance training session referred to in Section II.L. below. An attorney can discuss the scope of these sessions after they review/revise the employee handbook.

D. Job Descriptions

The Americans With Disabilities Act ("ADA") prohibits discrimination against those able to do the job's "essential functions" with or without a reasonable accommodation. Accordingly, job descriptions should be carefully reviewed to make sure they are complete and accurate in identifying the "essential functions" of the particular job. Additionally, it is wise to include a general "catch-all" similar to "and any other duties assigned by the company from time-to-time." Finally, companies should conduct a periodic review and updating of any job descriptions used to make sure that they comply with the comments above and are otherwise up to date. An attorney can assist in reviewing/drafting/revising any job descriptions to ensure that they do not run afoul of applicable law.

E. Family and Medical Leave

The federal Family and Medical Leave Act applies to employers who employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The FMLA allows "eligible" employees to take job-protected, unpaid leave or to substitute appropriate paid leave, if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a "family member" with a "serious health condition," or because of the employee's own "serious health condition." The FMLA also provides for certain military leave, protections to servicemen and their families. If you have questions on this front, consult an attorney. Furthermore, some states (*e.g.*, New Jersey and California) have their own leave laws which are similar to or more expansive than the FMLA and need to be addressed as well.

According to the Regulations adopted to implement the FMLA, to the extent that an employer is covered by the FMLA and has an employee handbook, the employer's FMLA policy must be contained in that document or in other written materials about leave and benefits. Additionally, employers must notify employees of their FMLA (and similar) rights as soon as possible after the employer learns of a possible FMLA-covered event. Generally speaking, an employer should notify an employee of his or her FMLA rights within three to five days of learning of an FMLA-covered event. All records related to the granting of an FMLA (or similar state) leave should be maintained in the employee's personnel file. (*See* discussion below in Section II.M. regarding personnel files).

If a company is a FMLA covered employer or covered by a state equivalent, it should review/draft an appropriate policy and related leave documents for its use.

F. Employee Discipline and Evaluations

It is important to deal with disciplinary issues as they arise and to conduct periodic evaluations of employees. In the simplest of terms, to the extent a company is sued by a former (or current) employee over the employment relationship, the company records relative to discipline and evaluations will, in most cases, provide the company with the best defense possible.

Individuals making and imposing disciplinary decisions and performing employee evaluations need to be accurate, objective and cautious in what is written and spoken. The following is of the upmost importance:

1. Companies need to be establish and follow a process so that performance evaluations are conducted on a periodic basis. In this regard, it is suggested that: (a) every employee be evaluated on an annual basis either on or about their anniversary date or at a given point in the year (*e.g.*, at year end); (b) the forms used for the evaluation process be tailored to meet the needs of a specific position or class of positions; (c) the forms do not rely merely on a "+" or "-" type system – meaningful specific and objective narrative evaluations are critical; (d) some other member of

the management team review the evaluations before they are reviewed with the employees; (e) each employee receive an oral evaluation that includes a review of the written forms – whether employees receive a copy of their evaluation forms is up to the company to decide in most states; and (f) employees should sign and date their evaluation forms so that there is a record that evaluations were reviewed with them. It should be part of managers responsibilities and, therefore, part of their own evaluation, that they properly and timely conduct the evaluations of those who report to them. The evaluation forms should be maintained in the employees' personnel files. (*See* discussion below in Section II.M. regarding personnel files).

Some commentators believe that it is best to not inform employees of their compensation adjustments during their evaluations. The reason for this is that in the event an employee receives an average or better than average evaluation but the company only provides for a cost of living or other nominal increase, the employee may fixate on the amount of the increase while ignoring the positive evaluation. On the other hand, if the evaluation is less than satisfactory yet the company has provided all employees with a relatively generous compensation increase, the employee may forget that they need to improve because they received an increase that is better than what they thought they would. Simply put, employees should have some time to digest the specifics and substance of their evaluations.

2. Companies also need to develop a system of reviewing and tracking discipline that is dispensed by various management employees. The goals here are the establishment of a system that will allow a company to make sure that any disciplinary action is fair; accurate; consistent with the law, company policy and a company's treatment of others; timely; and supported by investigation and documentation. Crucial in the process is making sure that policy is being followed and that people are being treated similarly. In order to do this, the head of human resources (or his/her designee) should be apprised of all discipline (via memorandum or short e-mail) – including verbal warnings – so that there can be some "uninvolved" person to screen the events in question and determine whether a written record should be maintained in the employee's personnel file. (*See* discussion below in Section II.M. regarding personnel files). Such a system should greatly reduce claims of, among others, favoritism.

G. Post-Offer Medical Exams/Drug Tests

Companies may require physical examinations under the following circumstances consistent with Title I of the ADA:

1. A medical examination is permitted following a conditional offer of employment if all entering employees in a particular job category are subject to the same physical examination requirements;

2. "Fitness-for-duty" examinations are permitted to determine if an employee still can perform the essential functions of the job, and to determine what reasonable accommodation(s), if any, may be required; or

3. Voluntary medical examinations are permitted that are part of on-site employee health programs (*e.g.*, "corporate wellness programs").

Once a conditional job offer has been made, a company may request that the candidate undergo an unrestricted physical examination. However, the company cannot refuse to hire the candidate based upon the results of the exam unless the decision is based on a legitimate business necessity or job-relatedness.

Drug tests generally fall into a category other than medical examinations. Generally speaking, an employer may require applicants for employment to submit to a pre-employment drug (and alcohol) test. Alternatively and possibly more practically, an employer can make a job offer contingent upon the successful completion of the pre-employment physical and a drug/alcohol test. Once an individual is in a company's employ however, the imposition of drug (and presumably alcohol) testing becomes slightly more complex and governed by state law. Some key point to consider with drug and alcohol testing include:

1. Companies should have in place an appropriate substance abuse policy that will be included as part of the employee handbook.

2. Alcoholism and drug addiction have been considered handicaps/disabilities for which employers need to make reasonable accommodations.

3. Under the Family and Medical Leave Act ("FMLA") an employee with a drug or alcohol "issue" may be entitled to a protected leave of absence.

4. Testing should be done for all applicants/employees in similar job classifications so as to avoid the appearance of a discriminatory motive.

5. Companies should utilize a form of consent form for the drug and alcohol testing. The signed consent form should be maintained in the employee's medical file (discussed below in Section II.M. regarding personnel files).

Please note that any records concerning the physical examinations/drug or alcohol tests of employees must be kept separate from employees' regular permanent personnel records to ensure that this information is not used to discriminate against employees with disabilities in making personnel decisions. Companies should establish and follow a policy of keeping a separate "medical file" for each employee for medical and workers' compensation records. (*See* discussion below in Section II.M. regarding personnel files).

H. Employee Benefit Plans/Independent Contractors

If a company offers employees various group benefit plans, someone should periodically review the plans that have been selected, not only for cost-related concerns, but to make sure that all individuals who are eligible for the plans are being offered participation in a timely manner (including the distribution of applicable summary plan descriptions ("SPDs"). A company that offers these plans should also maintain a record of the benefits selected by employees, as well as records of waivers of coverage. These records should be maintained in the employee personnel files. (*See* discussion below in Section II.M. regarding personnel files).

The Patient Protection and Affordable Care Act ("ACA") introduced the shared responsibility for employer provisions ("employer mandate" or "pay or play" penalty tax), which became applicable in 2015. The employer mandate provides that "applicable large employers" who do not offer medical coverage that is affordable and provides minimum value to 95% of their full-time employees and their children up to age 26 face a potential tax penalty. The ACA defines "applicable large employers" as employers with 50 or more full-time employees, and/or full-time equivalents ("FTEs"). Any employee who works 30 or more hours per week (at least 130 hours per month) is considered full-time. Companies that fail to satisfy these provisions may be subject to penalties. Additional rules may apply to a company under the ACA. Companies should work with an attorney to review whether their offer of medical coverage will allow them to avoid tax penalties and whether their medical plan satisfies the other provisions of the ACA.

The importance of reviewing benefit plans and who they are offered to cannot be understated. The problem that comes to mind is where an employee who was eligible for a specific insurance benefit, but was not offered the benefit (or who was offered the benefit but waived coverage and the Company does not have a record of the waiver), has a catastrophic illness and subsequently demands insurance coverage. In this situation, the insurance carrier will normally decline coverage and the employee may look to the company for reimbursement of his/her expenses on a third party beneficiary theory, among others. Accordingly, avoiding this potential exposure cannot be overlooked.

Another related issue to consider is "opt out" payments (i.e., when an employer makes a payment, either periodically or in a lump sum, to an employee in lieu of benefits). This may be done, for example, when an employee declines coverage under the employer's group health plan because the employee is covered under the plan maintained by his spouse's employer. Any opt out payment should be offered and made through a Section 125 Plan ("Cafeteria Plan"). While the opt out payment will be taxable income to the recipient employee in any case, the failure to provide that payment through a Section 125 plan may result in tax consequences to all employees, including those not receiving the "opt out" payments.

Companies need to address the use of "independent contractors" and "consultants." Independent contractors and consultants may provide services to a company for an extended period of time and, in some cases, may provide services that may be or are otherwise provided by a company's employees. On this point, the following concern should be addressed: to the extent that "independent contractors" and "consultants" are not treated as employees (in that they do not have taxes withheld from their compensation and they are not offered employee benefits) and are simply designated as an "independent contractor" or a "consultant" by a company and themselves, such designation and treatment does not prohibit a governmental agency (*e.g.*, the Department of Labor or IRS) from challenging that classification. In that case, a company may be assessed not only the employer's side of the appropriate taxes but also the employee's share. It is also possible that an administrative penalty could be assessed.

While the numbers related to taxes are relatively susceptible of calculation, other areas of potential exposure with consultants are not. For example, if a consultant has a catastrophic illness (*e.g.*, cancer or heart attack), the medical costs may be staggering. The consultant may later attempt to argue that he or she was really an employee and that, because he or she was not offered medical insurance benefits, the company is responsible for all medical bills. It is vital to be very careful about the use of "independent contractors" and "consultants" and make sure that companies paper the relationship as best as possible and do some due diligence on the intended relationship in advance. Should a company need any assistance in evaluating any independent contractor or consultant relationship, consult an attorney. Additionally, companies should do a careful analysis of anyone's situation who is paid and received a Form 1099 to make sure that they are truly independent contractors and not employees. In addition to taxes and benefits, the improper classification of employees as independent contractors or consultants raises a number of wage and hour issues that must also be addressed.

I. Wage & Hour Issues

1. Overtime and Exempt Employees

The test for exempt status, making the person ineligible for overtime, is not that the individual is paid on a salary basis; salary is only part of the overall analysis. Under both the federal and state wage and hour laws, there are detailed tests for exempt status. The tests have to be applied to each individual on a case-by-case basis, regardless of "job classification."

If an employee is not exempt, he must be paid overtime at a rate of one and one-half times his regular rate for all hours worked over 40 in a week. It is irrelevant that the overtime was not authorized/approved in advance. If it is worked, it must be paid. The same holds true for non-overtime hours. The remedy for an employee who works unauthorized hours, overtime or otherwise, is to impose discipline. Accordingly, companies should perform a detailed analysis of those employees not being compensated for overtime to assure that they are truly exempt employees.

In connection with the overtime over 40 hours worked rule, while it may be intuitive, many employers forget the following: if the "normal" workweek consists of 40 hours (35 actual work hours and five hours for lunch – whether paid or not), the employer need not pay overtime until the employee actually works over 40 hours. In essence, the employer can receive an additional five hours per workweek at straight time pay, if the employer has accurate time records establishing the work and lunch periods.

2. Time Records

Companies are required to retain accurate time records for almost all of their employees, indicating time in/out and breaks/meal periods, not simply "x" number of hours. In fact, time record forms should indicate both the total of non-overtime and overtime hours. Accordingly, it is imperative that companies keep accurate weekly time records - it can be as simple as filling in a sheet of paper every week or keeping a sign in/out log.

The failure to do so may subject a company to an administrative penalty and will make the successful defense of a wage and hour claim difficult, at best. Furthermore, if a company allows its employees to complete their own time sheets, it should require them to sign them verifying their accuracy.

Additionally, while the regulations do not require that time records be maintained for "exempt" employees, these records should be maintained for all employees – exempt and non-exempt alike. The reason for this is that there is significant risk if the employee in question is misclassified as exempt when he or she is actually not; the failure to have an accurate time record of hours worked may result in the imposition of an administrative penalty and, more significantly, make the defense of an overtime pay claim virtually impossible. For these reasons, companies should keep an accurate record of hours worked for all employees.

3. Payroll Deductions and Docking of Pay

Under both state and federal wage and hour laws, there are very limited items that can be deducted from an employee's pay. Generally speaking, only deductions for taxes and employee contributions to health insurance, life insurance and retirement benefit plans may be deducted from an employee's paycheck.

Employers may not, generally speaking, deduct monies from an employee's paycheck as a form of discipline (*e.g.*, violation of policy) or to recoup monies lost by an employee (*e.g.*, register shortages) or improperly extended to an employee (*e.g.*, expense money advancements). The proper mode of recovery of these types of losses is through disciplinary action or litigation. Notwithstanding the foregoing, to the extent that a company allows an employee to apply paid leave time to an absence before it is accrued, upon termination, an employer may do a payroll adjustment to correct for any paid leave time taken but not accrued.

Simply put, the watch words when doing any deduction from an employee's paycheck are to double check the applicable statutes and regulations to make sure the company is not running afoul of any applicable law. Should there be any specific deduction the company has made or intends on making an attorney should review them for conformity with the applicable statutes and regulations.

J. Workers' Compensation

Under most Workers' Compensation Acts, employers are required to insure the payment of compensation for employees injured on the job, provided that the employee himself was not willfully negligent at the time of receiving such injury.

As further mandated by the Acts, an employer must file a report in accordance with the terms of its insurance policy upon the happening of any accident or the occurrence of any compensable occupational disease in his establishment. Such a report, which is normally furnished by the insurance carrier, must be filed with the applicable state agency. If an employer needs any further information concerning their obligations under the Acts, they should consult an attorney.

K. Posting Requirements

Various federal and state laws require that certain notices be placed in conspicuous places to put employees on notice of their rights and, in some instances, their obligations. Employers should place the postings near a lunchroom and time clocks either in a laminated form or in a glass case.

For reference, below is a list of required federal postings. :

1. Combined EEOC-OFCCP Posting: satisfies the posting requirements for the following laws:

   a. Civil Rights Act of 1964 (Title VII);

   b. Americans With Disabilities Act of 1990;

   c. Age Discrimination in Employment Act of 1967;

   d. Equal Pay Act of 1963;

   e. Executive Order 11246;

   f. Rehabilitation Act of 1973;

   g. Vietnam Era Veterans Readjustment Act of 1974;

   h. Genetic Information Nondiscrimination Act of 2008.

2. Fair Labor Standards Act Posting.

3. Occupational Safety and Health Act of 1970 Posting.

4. Federal Family and Medical Leave Act of 1993.

5. Employee Polygraph Protection Act of 1988 Posting.

6. Your Rights Under USERRA Posting.

Many states have their own posting requirements companies should carefully review to ensure compliance.

L. Sexual Harassment

With the increased emphasis on sexual harassment in the workplace, no employer should be without a well-defined and administered sexual harassment policy. This policy generally defines what may constitute sexual harassment, provides a procedure for reporting it to management, and a mechanism for investigating the complaint and, if appropriate, for disciplining those involved. Recently, courts have begun to expand the arena of "harassment" law to cover harassment claims based upon other protected classifications (*e.g.*, race, sexual orientation, religion, handicap/disability). As a result of these developments, an employer's policy should be expanded to include harassment based upon any recognized protected classification.

Additionally, the courts have indicated that one of the factors that comprise an overall corporate commitment to a work environment free from sexual, as well as other forms of, harassment is periodic harassment avoidance training. In the past, courts have merely alluded to this as a factor to consider; however, more recently courts have been raising the bar and basically requiring such in-service training in order for an employer to avail itself of certain defenses. Attorneys can conduct the appropriate employee training or the company can do it itself. Regardless of who does the training, it is beneficial to discuss the specifics of the training and any related follow up with an attorney.

In the event that a claim of sexual harassment is made, those who are responsible for implementing a company's policy need to be prepared to deal with any issues that may arise. In this regard, a company should train those involved in that process so they are prepared to address the issues in the event a claim is made.

M. Personnel/Medical Files

There are many schools of thought on the exact content of employee personnel files. As a starting point, each employee should have two files. One file should be maintained to cover general employment-related documentation and one file should be maintained to retain medical and health-related documentation. Additionally, as noted in Section II.A. above, the Form I-9 must not be in either of these files. Once an individual leaves a company's employ, the company should place the employee's personnel file, medical file and I-9 in an envelope and retain those records as set forth in Section IV.C. below.

While there is no statutory or regulatory list that sets forth, in an all-inclusive manner, what should be maintained in an employee's personnel file, there are some items that should not be included. The following list provides a sense of what should be included in an employee's personnel file:

- Employee's name, address, telephone number;
- Employee's Application For Employment along with any resume, etc.;
- Any documentation regarding an offer of employment;
- Wage/salary documentation;
- Promotion, demotion, transfer documentation;
- Disciplinary documentation;
- Performance evaluations;
- Employee Handbook Acknowledgement signature page for original handbook and any supplements;
- Benefit documentation;
- Training documentation;
- Licensure documentation;

- Reference inquiry documentation;

- Social Security Number;

- Payroll data (*e.g.*, W-4 and W-2);

- Leave request documentation;

- Attendance records; and

- Job Descriptions.

By no means should this list be considered all-inclusive. To the extent that a company utilizes other forms or maintains other employment-related documentation, those should be included in an employee's personnel file as well.

Notwithstanding the foregoing, there are materials that should not be included in an employee's personnel file. These materials are those that relate to an employee's medical and/or health history, condition or treatment including, but not limited to, workers' compensation records. Accordingly, these materials must be maintained in a separate employee medical file. The purpose of this limitation is to prevent those making employment-related decisions from making any determination based on an individual's actual or perceived disability/handicap. Please note, however, that simple doctors' office notes may not necessarily be considered medical documentation unless they contain specific diagnosis or treatment information.

N. OSHA Issues

Companies have certain obligations under OSHA and regulations for certain aspects of their operations. A detailed review of these requirements is outside the scope of this outline. Should a company need assistance or have any questions concerning a company's OSHA obligations, please contact an attorney.

III. POST-EMPLOYMENT

A. COBRA

The failure to properly comply with COBRA can expose a company to the full cost of any medical treatment to a former employee who is not properly advised of the employee's COBRA rights.

While some insurance carriers provide COBRA forms, the forms frequently are deficient from the perspective of the employer's obligations of notification to the employee/beneficiaries of their COBRA rights. An employer should allow an attorney to review a copy of its COBRA paperwork for statutory and regulatory compliance. Alternatively, an attorney can prepare a complete set of COBRA forms for a company's use. Should a company have any questions about COBRA generally, or its application to any specific employee (or a covered beneficiary), contact an attorney.

B. Employee References

As employers are aware, departing employees usually seek other employment and prospective employers frequently contact the former employer for a reference check. As indicated, a company's policy should be to only respond to inquiries by providing the former employee's dates of employment, confirming salary history, and last position. Such a policy is intended to protect against defamation claims brought by former employees. As discussed in Section I.B. above, employers could also inform the person requesting a reference whether a former employee is eligible to be rehired. A company, however, should only provide more information if it has written authorization to do so from the former employee. Additionally, employees should be made aware that all reference requests must be referred to a designated individual for reply.

IV. MISCELLANEOUS

A. EEO-1

Generally speaking, all private employers who are subject to Title VII of the Civil Rights Act of 1964, as amended, with 100 or more employees, or who have fewer than 100 employees but are owned or affiliated with another company so that, combined as a single, legal employer, they have 100 or more employees, are required to complete and file with the EEOC an EEO-1 form. The EEO-1 form provides the EEOC with the employer's basic EEO statistics in a given year.

B. Severance Agreements

Under certain circumstances employers are willing to provide some form of severance payment to terminated employees. In most cases, the quid pro quo for the payment should be, at a minimum, a release of claims executed for the benefit of the employer. Such an agreement operates as a form of "insurance policy" against claims brought by the former employee.

The law governing these types of agreements is relatively specific and does change periodically, either by court interpretation of other agreements or of the law or by the enactment of new legislation/regulation. Therefore, the mere fact an attorney has provided you with a form of agreement in the past does not mean that the form will past muster under current law. Accordingly, should a company decide to offer a severance benefit to and obtain a release from a former employee, it should consult an attorney at that time to prepare the appropriate form of agreement for the company to use.

C. Record Retention

There are a myriad of different record retention rules that apply to various employment-related records that must be retained by companies. In addition to federal law, there are state-specific requirements for the retention of these types of records. In many respects, the state requirements are similar to the federal rules. Additionally, if you have any questions about the specific retention period for a particular type of document, contact an attorney.

Since the time period for retaining different types of records varies, it is safest for companies to adopt a uniform retention policy whereby these records are maintained for a period of not less than 10 years; and 30 years (after employment has ended) for OSHA exposure records. This length of time protects a company should a claim be made against it, and the company need to formulate an appropriate defense. If this length of time poses a problem for a company, it should consult an attorney to make sure its policy conforms the applicable regulations.

CONCLUSION:

As the breath of a human resources workplace audit can be overwhelming, once a company has the opportunity to digest this information, it should contact an attorney with any issues its review may have revealed. We would be happy to assist your company in identifying any problem areas and developing a plan to remedy those issues.

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