

SPRING CLEANING

Is Your Company in Compliance?

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EMPLOYMENT APPLICATIONS

- Pay attention to federal, state and local laws!
- Different state and local laws for various topics, including:
 - “Ban-the-Box” legislation
 - Wage equity ordinances

EMPLOYMENT APPLICATIONS: BAN-THE-BOX

- Many states and cities have enacted legislation that prevents employers from making hiring decisions based on an applicant's criminal history
 - California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, Oregon, Rhode Island, Texas, Vermont, Washington, Washington D.C.
- Generally, employment applications cannot contain questions about an applicant's criminal history
- Some laws require that an applicant's criminal history can only be addressed after a conditional job offer has been made
- Some laws provide only specific, limited conditions under which an employer may deny employment based on an applicant's criminal history

EMPLOYMENT APPLICATIONS: WAGE EQUITY LAWS

- Several states and cities have passed or will pass legislation banning employers from asking about an applicant's salary history
 - Philadelphia, New York City
 - Massachusetts, New Jersey
- Designed to address equal pay
- What is the scope?

EMPLOYMENT APPLICATIONS: FAIR CREDIT REPORTING ACT

- Must obtain an applicant's consent before checking credit report
- Warn applicant if rejection is based on credit history
- Give applicant final notice of decision and opportunity to challenge credit report
- State laws may be more restrictive

EMPLOYMENT APPLICATIONS: OTHER ISSUES

- At-will language
- Non-discrimination language with 180 day accommodation language can prevent accommodation lawsuits
- Can require arbitration of disputes arising from application
- Can require time limitation on bringing a claim (i.e., 180 days)

EMPLOYMENT HANDBOOKS: WHAT POLICIES SHOULD I INCLUDE?

- At-will employment language
- Anti-discrimination policy
- Anti-retaliation policy
- Anti-harassment policy
- ADA accommodations
- FMLA
- Attendance
- Discipline
- Other policies

EMPLOYMENT HANDBOOKS: ANTI-DISCRIMINATION AND ANTI-HARASSMENT POLICIES

- What to include?
 - Explain the complaint procedure
 - State that all claims will be investigated
 - Identify at least two management persons to whom complaints can be made

EMPLOYMENT HANDBOOKS: ANTI-DISCRIMINATION AND ANTI-HARASSMENT POLICIES

- What to include? (cont.)
 - EEOC prefers remedies to be set forth in policy
 - Prohibit retaliation or have a specific, anti-retaliation policy
 - Define sexual harassment and hostile work environment
 - Make sure the policies are thorough and cover all forms of discrimination and harassment

EMPLOYMENT HANDBOOKS: ANTI-RETALIATION POLICIES

- Define “protected activity”
 - Filing a charge with a federal agency or state agency
 - Filing an internal complaint
 - Requesting military or family leave
 - Reporting internal financial misconduct

EMPLOYMENT HANDBOOKS: ANTI-RETALIATION POLICIES

- Define “protected activity” (cont.)
 - Requesting an ADA accommodation
 - Filing a workers’ compensation or unemployment benefits claim
- Publicize the policy

EMPLOYMENT HANDBOOKS: WORKPLACE INVESTIGATIONS

- Do not delay the investigation
- Interview the victim, alleged harasser, all witnesses
- Train investigators
- Take appropriate remedial action

EMPLOYMENT HANDBOOKS: ADA ACCOMMODATIONS

- Outline procedure for employee seeking a reasonable accommodation
- Train supervisors about what to look for when an employee makes a request for an accommodation
 - There are no magic words

EMPLOYMENT HANDBOOKS: FMLA LEAVE

- If you have over 50 employees, then you must have an FMLA policy
- Common pitfalls
 - Failing to provide employees with a Notice of Rights under FMLA
 - Failing to recognize when an employee has made a request for FMLA leave
 - Failing to provide the employee with a Notice of Eligibility and Rights & Responsibilities

EMPLOYMENT HANDBOOKS: FMLA LEAVE

- Common pitfalls (cont.)
 - Failing to notify the employee that a fitness for duty certification is required and to provide a description of job duties
 - Failing to designate an employee's leave as FMLA leave
 - Failing to educate front line supervisors
 - Failing to require an employee to run his/her FMLA leave concurrent with other leaves and paid leaves

EMPLOYMENT HANDBOOKS: FMLA LEAVE

- Common pitfalls (cont.)
 - Failing to require a complete certification of health care provider
 - Sharing too much medical information with supervisors
 - Terminating an employee who fails to return to work at the conclusion of his/her FMLA leave
 - Failing to return the employee to the same or an equivalent position

EMPLOYMENT HANDBOOKS: DISCIPLINE POLICIES

- Progressive discipline policy
- Documentation is crucial
- How to discipline?
 - Inform employee of rules infraction
 - Listen to employee's explanation
 - Tell employee how to correct his/her performance

EMPLOYMENT HANDBOOKS: DISCIPLINE POLICIES

- Rules of discharge
 - Did the employee know the rule?
 - Was the rule reasonable?
 - Was there a fair investigation before discipline?
 - Can the employer prove the employee violated the rule?
 - Was the rule uniformly enforced?
 - Was the discipline reasonable?

EMPLOYMENT HANDBOOKS: DISCIPLINE POLICIES

- Ask yourself, is the employee:
 - in a protected class?
 - someone who complained about discrimination or harassment?
 - a whistleblower?
 - active in the union?

EMPLOYMENT HANDBOOKS: E-MAIL AND COMPUTER USAGE POLICIES

- Adopt a written policy
- Eliminate any employee expectation of privacy
 - All computer files, e-mails and voice mails are the property of the employer
 - Computer usage will be monitored by employer
- Define all prohibited uses and prohibit downloading without IT involvement

EMPLOYMENT HANDBOOKS: SOCIAL MEDIA POLICIES

- What laws are at play?
 - National Labor Relations Act
 - Discrimination laws
 - Whistleblower laws
 - Invasion of Privacy
 - Trade Secrets Acts
 - Defamation
 - State laws

EMPLOYMENT HANDBOOKS: SOCIAL MEDIA POLICIES

- Generally, policies that prohibit the use of social media or prohibit the use of “inappropriate” language in the social media context are construed as vague and overbroad by the NLRB
- Carefully word policies
 - Do not use general terms

OVERTIME AND THE FAIR LABOR STANDARDS ACT

- Not all salaried employees are exempt from overtime pay
- Focus on job duties, not titles
- Periodic review of salaried employees to ensure exemption
- Prohibit OT work without supervisor approval
 - Common trap: allowing non-exempt employees to work through lunch can give rise to OT liability

POTENTIAL ISSUES WITH NEW ADMINISTRATION

- Enforcement of EEOC Guidance
- Immigration issues
- Affordable Care Act issues

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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