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

- 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-RETAIATION 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

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