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THE EMPLOYMENT SELF AUDIT: FIX IT YOURSELF BEFORE YOU ARE SUED

By: Sidney F. Lewis V

From employment discrimination claims to wage and hour matters, litigation is expensive and time consuming. Often, employers can avoid litigation by routinely conducting self audits with regard to their personnel, wage and hour, and benefits practices. The following areas can be fixed before it is too late.

1. HIRING PROCEDURES

A. Employment Criteria

Most employers who do not have federal contract obligations are not required to affirmatively seek out applicants on the basis of race, gender, or veteran status. However, neutral employment criteria can result in litigation if the criteria used result in adverse hiring practices. If applicants of a certain sex, age, gender, race, religion, national origin, or other protected classification are disproportionately excluded due to neutral criteria and there is no valid business justification for the criteria, liability could result. It is always important for employers to monitor the application of their neutral employment criteria to prevent a disparate impact and, if a disparate impact does appear, to seek advice and ensure that the neutral employment criteria are justified by business necessity.

B. Applications/Interviews

Applications should be regularly checked for compliance with federal and state laws. Many standard applications are generated from national companies and contain questions that are not germane to the particular employer or have additional information that only applies to employers with federal contracts. An employer should only ask the questions it needs answered to make an employment decision.

Under federal law, solicited applications and interview notes must be kept for one year. However, the application should only have an active period of 60 or 90 days so as to not remain open-ended. If applicants are not hired within the active period, they should be instructed to return and

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personally reapply. All inactive applications should be kept in a separate file and must be kept for the one-year period, or longer if the individual is eventually hired.

2. WAGE AND HOUR ISSUES

Wage and hour litigation is on the rise. Plaintiffs' attorneys have recognized the ease with which violations can be found and the added benefit of liquidated damages and attorneys' fees. The following are areas that routinely should be checked by an employer:

A. Salaried and Exempt Personnel

Just because employees are paid salaries does not mean they are exempt under the wage and hour laws. Employees are exempt from overtime only if they meet certain specific criteria as spelled out by the Department of Labor. Overtime exemptions are limited and available only to individuals employed in bona fide executive, administrative, and professional capacities, and other special categories.

To be exempt, executive employees must supervise two or more full-time employees and exercise discretion and independent judgment. Their primary duty must be supervision. A supervisor who works side-by-side with employees may not be considered exempt. Administrative employees must make important and unsupervised decisions that further the general business operations of the employer and are not routine in nature. The Department of Labor frequently takes the position that certain employees make the same decisions over and over and that such a routine eliminates the presence of discretion and independent judgment. Secretaries and clericals are rarely exempt.

Outside salesmen are exempt, but only if they work on the road and perform no work out of their home or the office. Drivers are exempt if they operate vehicles that cross state lines or transport goods that are in the flow of interstate commerce. Seamen are exempt only if they aid in the navigation of a vessel as a means of transportation.

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Independent contractors are frequently used by employers to avoid traditional “employee” issues, but many of these contractors are considered employees by the federal government, subject to all withholdings as well as minimum wage and overtime compensation. Labeling an employee an independent contractor is not enough. There are many criteria that must be satisfied for an individual to be legally classified as an independent contractor.

Other issues that frequently arise are incentive bonuses, which cause an increase in the regular rate for the period in question and thus increase the overtime owed. Standard rest periods must be paid, and unpaid meal periods must be uninterrupted and last at least thirty minutes. Properly capturing working time is a constant problem for employers, as is payment of overtime for employees who receive different hourly rates during the week.

3. EMPLOYEE HANDBOOKS

It is always a good idea to routinely review and update the policies in your employee handbook. Federal and state laws are constantly redefined by the court system and these changes may alter what you should reflect in your employee handbook. The following policies are the most important to check regularly.

A. Vacation Pay Policies

In Louisiana, all earned but unused vacation is payable upon termination. The vacation policy must clearly state what vacation is earned and when it is earned, such that there is no dispute as to what is owed to an employee upon termination.

B. Harassment Policy

A harassment policy must deal with more than just sexual harassment. It should prohibit harassment based on any protected status. Furthermore, care should be taken with regard to the drafting of the policy and the point person for any complaints. Generally, employees should be directed to complain to

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those high in the chain of command, so as to avoid any problems created by supervisors who fail to act or act inappropriately when a complaint arises.

C. Family and Medical Leave Act (FMLA)

An FMLA policy must be in every handbook for any employer with 50 or more employees.

4. FAMILY AND MEDICAL LEAVE ACT

Ten years after this law was passed, many employers are still unfamiliar with all of the requirements. The real danger for employers is the inadvertent discipline or termination of eligible employees for absences that qualified under the FMLA. It is extremely important for employers to have proper documentation as to the reasons for an employee's absence. Remember, employees do not have to request FMLA leave; employees only have to indicate why they are absent and it is up to the employer to designate the absences as FMLA qualifying. Many single or partial day absences can qualify under the FMLA, especially when the absence involves care for a parent, spouse, or child. Work-related injuries resulting in workers' compensation benefits will also qualify under the FMLA if they meet the criteria.

It also is imperative that employers have properly worded policies. All employers, for example, should use a rolling twelve-month period for calculation purposes. Employers should also conspicuously post all FMLA posters and regularly train supervisors on the requirements of this law.

5. FAIR CREDIT REPORTING ACT

If a consumer report is procured on an applicant, the employer must follow strict procedures. A consumer report is any report that reflects on an individual's general reputation, mode of living, and/or character, among other things, and is used by the employer to ascertain eligibility for employment. A consumer report does not include any information obtained by the employer directly from the source, such as an employment reference.

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Before procuring a consumer report, the employer must disclose in writing to the applicant or employee that a report will be obtained and receive the employee's written authorization. This disclosure cannot be included in an employment application. Before taking adverse action based in whole or in part on a consumer report, an employer must send or give to the applicant/employee: (1) a copy of the consumer report received from the consumer reporting agency; and (2) a copy of the Summary of Rights as prescribed by the Federal Trade Commission.

If an employer decides to deny employment based in whole or in part on information contained in a consumer report, then it must furnish in writing to the applicant/employee: (1) the name, address, and phone number of the consumer reporting agency (CRA); (2) a statement that the CRA did not make the decision to take the adverse action and is unable to provide the consumer specific reasons why the adverse action was taken; (3) a statement setting forth the consumer's right to gain a free disclosure of the consumer's file from the CRA if the consumer requests the report within 60 days; and (4) a statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information it provided

Violation of this federal law could result in an award of compensatory and punitive damages to the victim. Now is the time to ensure compliance before it is too late.

In sum, employment self audits allow employers to fix problems and spend funds on something other than attorneys' fees and back pay.

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