10 Common Employment Law Mistakes

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Mistake Number One

- Failure to keep the Employee Handbook Up to Date
Why Have an Employee Handbook?

- Notice
  - Standards of Conduct
  - Performance Expectations
  - At Will Status
  - Employees Rights and Duties
- Provide Good Evidence
  - Contract Disclaimers
  - Sexual Harassment Policies
Mistake Number Two

• Creating an “Implied Contract”
What is an “Implied Contract?”

• Representations that Create the Impression of Guaranteed
  – Treatment
  – Procedures
  – Longevity
Avoid

- Promissory Language
  - “Will”
  - “Shall”
  - “Always”
  - “Never”
- Any Policy You Will Not Really Carry Out
- Policies Intended to be Enforced Against Employees
Mistake Number Three

- Failing to Have an Adequate Sexual Harassment Policy
Why Have a Sexual Harassment Policy?

- Provides an Affirmative Defense to Sexual Harassment Claims
- Avoids Punitive Damages Claims
A Good Sexual Harassment Policy Includes

– Statement of Equal Employment Opportunity
– Prohibition of Sexual Harassment
– Definition of Sexual Harassment
– Complaint Procedure
– Description of Investigation/Corrective Action
– Prohibition of Retaliation
– Acknowledgment
Mistake Number Four

• Falling Into the “Retaliation Trap”
Retaliation Is

- Protected Activity
- Adverse Employment Action
- Causal Connection Between the Two
Protected Activity

- Exercising Certain Statutory Rights
- Opposing Discrimination or Harassment
- Participation in an Investigation
Adverse Employment Action

• Dissuade a Reasonable Employee from Complaining
Causal Connection

- Temporal Proximity
- Documentation
If the Employee has Engaged in Protected Activity

- Proceed with Caution
Mistake Number Five

• Failure to Follow Proper I-9 Procedures
I-9 Procedures

- All Employees
- Within 3 Days of Hire
- Follow the Form
DOCUMENT RETENTION

• Later of
  – 3 Years from Hire
  – 1 Year from Termination
• Track Dates
• Do Not Retain Supporting Documents
Avoiding Discrimination Claims

• Do Not
  – Specify Which Documents are Acceptable
  – Challenge Documents that Appear Genuine
  – Refuse Documents that Expire
  – Consider Appearance, Accent, Name or Citizenship
  – Require Citizenship or Permanent Resident Status
Mistake Number Six

• Improper Classification of Employees as Exempt from Overtime Requirements
Salaried ≠ Exempt
Common Exemptions

- Executive
- Administrative
- Professional
- Outside sales
- Computer professionals
Mistake Number Seven

- Treating Employees as “Independent Contractors”
Responsibility

Control
Factors to Consider

- How, When, Where, Who
- Required Training
- Reporting
- Periodic Pay
- Payment of Expenses
- Furnishing Tools or Materials
- Profit & Loss
Mistake Number Eight

• Improper Evaluation and Screening of Applicants
At Least Some Background Investigation is Advisable

- At a minimum, confirm work history and references
- For some jobs, a more extensive background check may be advisable
- Written Consent
Mistake Number Nine

- Failure to Accurately Document Performance
Why Document Performance?

– Notice and Opportunity to Correct
– Create a Record of Problems
Common Problems with Performance Evaluations

• “Grade Inflation”
• Lack of Thoroughness
• Improper Tone
Mistake Number Ten

• Mishandling Terminations
Termination: The Ultimate Employment Decision
Two Rules of Thumb

– Base Decisions on Fact
– Treat Employees with Dignity and Respect
Base Decisions on Facts

– Understand the Context
– Investigate
– Take Your Time
Treat Employees With Dignity and Respect

– Setting and Tone
– Be Clear and to the Point
– Respect the Person’s Dignity
– Give Employee a Road Map
Questions?