

TOP 10 BEST PRACTICES TO HELP EMPLOYERS AVOID LITIGATION

Unfortunately, employment-related litigation has become a cost of doing business. Here are ten best practices which will help an employer operate its business, avoid litigation, or put itself in a better position if the employer is sued.

1. Implement an Effective Employee Handbook – Employee handbooks are excellent communication tools for an employer to convey workplace information and its expectations of employees. A handbook should make clear it is not a contract between the employer and the employee. Handbooks should be provided to employees in a user-friendly format, and periodically reviewed and updated. Employees should receive regular training about handbook provisions and updates. The handbook should include policies which are required by the applicable state and federal laws, and be tailored to the employer's business operations.

2. Conduct Performance Evaluations – Performance evaluations are helpful if they are timely and accurate. It's a good idea to have annual performance evaluations or more often as needed. Employers should review their performance evaluation form and make sure it really reflects their business operations and captures pertinent information. A performance evaluation is only as good as the information it contains, however, and supervisors should receive training about how to fairly and accurately evaluate employees.

3. Coordinate Communications Between Supervisors and Human Resources – Sometimes supervisors who are untrained about potential employment-law risks make uninformed decisions without consulting Human Resources (HR). Ideally, HR takes a lead role in analyzing employment decisions, responding to complaints, requests for accommodations and requests for leave. Supervisors should review potential discipline and termination decisions with HR before finalizing and communicating the decision.

4. Comply with Wage and Hour Requirements – Wage and hour compliance means more than just paying employees on time. There are nuances in state and federal laws about when to pay an employee, what is included in final wages, classification of employees, overtime, travel time and other wages issues which employers need to address on a daily basis. Employers will reap the benefits of making good wage and hour training available to their accounting, payroll and HR professionals.

5. Manage Leave and Reinstatement – Leave laws vary by state, and employers can be surprised by the existence of some lesser-known state leave laws. An employer should verify it follows all required leave laws, and work to accurately track an employee's leave time. Many leave laws contain a right for the employee to be reinstated when the employee returns from leave. This is an area where there should be coordination between HR and supervisor about operational needs, the employee's expected return to work, and any modifications which should be explored.

6. Engage in an Interactive Process about Reasonable Accommodations – Many employers are subject to federal and/or state disability laws which provide employment protections for qualified individuals with disabilities. Depending on the circumstances, these

disability laws require covered employers to engage in a dialogue with a qualified applicant or employee about whether any reasonable accommodations are necessary for the qualified individual to perform the essential functions of the job. This area of the law has very detailed requirements, and this interactive process proceeds on a case-by-case basis. This is another example of where HR professionals who are experienced with disability laws should be directly involved in these discussions to ensure the employer complies with the law and avoids some hidden pitfalls.

7. Promptly and Effectively Investigate Complaints –An employer is generally obligated to promptly and effectively investigate employee complaints about potential illegal behavior, such as alleged workplace discrimination or safety violations. The ultimate goal is to promptly and effectively remedy the problem. Again, the training of HR professionals can be extremely helpful so that they are aware of applicable legal standards and how to immediately prioritize an investigation.

8. Document Counseling and Discipline – Employers should make a concise and accurate record of important discussions with employees, including counseling and discipline. The goal is to notify the employee of problems or achievements, and give the employee a chance to improve. If standards from the employer’s handbook are at issue, they should be referenced. Further documentation can summarize previous issues and whether the employee corrected the problem.

9. Avoid Retaliation Claims –An employee may have a viable retaliation claim if some negative employment action happened after the employee complained about illegal conduct or participated in a hearing or in an investigation. HR and management should examine the timing and substance of potential disciplinary action before any such action is taken, and see if there is appropriate action which would both work for the employer’s operations and reduce the potential for a retaliation claim.

10. Manage a Termination Decision and its Aftermath –Management and HR should analyze a potential termination decision and review associated risk factors (protected status of employee, protected leave, timing of termination, whistleblowers’ issues, etc.) *before* the decision is finalized. If litigation is threatened, the employer should notify its insurance carrier(s) and consult employment legal counsel.

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