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the way®

*Managing Human Resources:
Ensuring Compliance with
Federal and State Workplace Laws*

September 28, 2001

Managing Human Resources

Overview

I.The Employment Relationship

II.Dealing with Our Wage & Hour Laws

III.Avoiding Claims of Workplace Retaliation

IV.Documentation, Discipline and Discharge

V.Employee Review and Performance Appraisals

Pop Quiz

True or False

- P A Employment at will @ means that the employer and the employee can terminate the employment relationship at any time.*
- P All salaried employees are exempt from overtime.*
- P 16 year olds can operate a motor vehicle on-the-job if they have a valid drivers license.*
- P Nebraska law requires an employer to pay a terminated employee all wages owed within 7 days of the date of termination.*
- P An employer may decline to hire a job applicant if it discovers that the applicant has filed a discrimination claim against his former employer.*

The Employment Relationship

The Employment Relationship

PContract Employees

PTemporary Employees

PIndependent Contractors

PLeased Employees

PEmployees at Will

Employment at Will

Absent a contractual or legal restriction, both the employer and employee are free to terminate the employment relationship at any time for any reason whatsoever without incurring liability.

Employment at Will

- PMost states recognize Aemployment at will. @*
- PNebraska is an Aat will @employment state.*
- PChief is an Aat will @employer.*

Employment at Will

Exceptions

P *Statutory*

< *Title VII*

P *Contractual*

< *Implied in Fact*

P *Tort*

< *Public policy*

B *Refusal to commit unlawful act*

B *Fulfilling public obligation*

B *Exercising right or privilege*

Employment at Will

Supervisors

P Some courts permit terminated employees to sue their employer and their supervisor for wrongful discharge.

P Supervisors can be required to hire their own attorneys and pay any damages awarded out of their own pocket.

P Supervisors have the primary responsibility for complying with state and federal employment laws.

The Employment Relationship

Recap

- P Variety of employment relationships*
- P Employment at will is most common*
- P Being an Aat will @ employer*
- P Lots of exceptions to employment at will*
- P Supervisors are the front line defense*

Dealing with Our Wage & Hour Laws

Wage & Hour

Fair Labor Standards Act of 1938

*PA****Adopted in 1938***

*PA****Addresses:***

- < Minimum Wages*
- < Overtime Pay*
- < Child Labor*
- < Recordkeeping*

*PA****Does Not Require:***

- < Vacation and Holiday Pay*
- < Severance Pay*
- < Premium Pay for Weekends or Holidays*
- < Meal or Rest Periods*

Wage & Hour

Minimum Wage

P Since September 1997, has been \$5.15/hour

P Today violations are rare

P Potential pitfalls:

- < Failure to pay for training time*

- < Employer deductions for benefit of employer:*

 - B Uniforms*

 - B Tools*

 - B Cash Shortages*

Wage & Hour

Overtime

P Requires nonexempt employees to be paid:

< 1 1/2 times

< A regular rate of pay @

< for all A hours worked @ over 40

< in a A workweek @

Wage & Hour

Overtime

PA Regular Rate of Pay @

<All remuneration paid to, or on behalf of, an employee

<Easy to calculate for hourly employees

<More difficult to calculate for employees paid on a:

B Piece rate

B Salary

B Commission

Wage & Hour

Overtime

PAHours Worked @

<All hours employer Asuffers or permits @employee to work.

<Preparatory activities?

<On-call time?

<Lunch break?

Wage & Hour

Overtime

P Workweek

< Need not correspond to calendar week

< A fixed and recurring period of

B 168 hours

B 7 consecutive 24-hour days

Wage & Hour

Overtime

PMost common exemptions are the Awhite collar @exemptions

<Executive

<Administrative

<Professional

<Outside salespersons

PEach have a Asalary @and Aduties @component

Wage & Hour

Overtime

Administrative Exemption

< Salary Requirement

B Generally must receive salary of \$250 or more per week

B Can receive salary as low as \$155/week, but tougher standard

< Duties Requirement

B Primary duty is office or nonmanual work that is directly related to the management policies or general business operations of the company; and

B Job requires employee to exercise discretion and independent judgment

Wage & Hour

Child Labor

P Distinctions between Agricultural and Nonagricultural Jobs

P Nonagricultural Jobs

< 14 & 15 year olds

B Nonhazardous jobs only

B Maximum of 3 hours on school day

B Maximum of 18 hours in school week

B Maximum of 8 hours on nonschool day

B Maximum of 40 hours in nonschool week

B 7 a.m. to 7 p.m. (9 p.m. from June 1 to Labor Day)

Wage & Hour

Child Labor

Nonagricultural Jobs (cont=d)

<16 and 17 year olds

B No restriction on hours

B Prevented from working in hazardous occupations

B 17 Hazardous Occupation Orders

B Coal Mines

B Operating power-driven woodworking machines

B Operating power driven metal-forming, punching or shearing machines

B Operating bakery machines

B Operating power saws

B Roofing operations

B Excavation operations

Wage & Hour

Recordkeeping Requirements

Burden is on employer to keep accurate records on:

- < Personal information*
- < Hours worked*
- < Regular rate of pay*
- < Deductions from wages*
- < Total wages paid*

Wage & Hour

Nebraska Wage Payment & Collection Act

*P*Must provide employees with 30 days written notice prior to changing payday.

*P*Must pay separated employee his wages owed
< On next regular payday, or
< Within 2 weeks of separation, whichever comes first.

*P*Unless authorized or required by law or court order, cannot make any deductions from employee's wages without employee's written consent.

Wage & Hour

Common Pitfalls

Allowing 16 and 17 year olds to operate motor vehicles

<Drive for Teen Employment Act (Oct. 1998)

<16 year olds can never operate motor vehicle on-the-job

<17 year olds can, provided:

B daylight hours only

B completed state-approved drivers ed course

B instructed to wear seatbelts

B severe limitations on transporting passengers or goods

B cannot drive beyond 30 mile radius from work

B no more than 1/3 of time in any workday or 20% in

Wage & Hour

Common Pitfalls

P Classifying Nonexempt Employees as Exempt

- < Must be able to point to applicable exemption*

- < White collar exemptions have duties and salary test*

- < Salary Test:*

- B Employee receives predetermined amount not subject to reduction because of variations in quality or quantity of work*

- < Policies that tend to jeopardize salary-basis test:*

- B deductions for part-day absences*

- B payment of additional compensation for extra hours worked*

Wage & Hour

Common Pitfalls

PIgnoring What is Meant by AHours Worked @

<Eager Beavers

<Working off the clock

<Prepartory activities

Wage & Hour

Common Pitfalls

Improper Treatment of Rest & Lunch Breaks

< Rest breaks between 5 and 20 minutes are A hours worked @

< Bona fide meal breaks of 30 or more minutes are not A hours worked @

B Employee must be completely relieved of work

B Employee need not be allowed to leave the premises

Avoiding Claims of Workplace Retaliation

Unlawful Retaliation

Employment Laws That Make Retaliation Unlawful

P *Title VII*

P *ADEA*

P *ADA*

P *FMLA*

P *Nebraska Fair Employment Practice Act*

Unlawful Retaliation

A Growing Threat

P Fastest growing category of discrimination

P Retaliation claims now account for more than 25% of all claims filed with EEOC

Unlawful Retaliation

3 Factors

- P The individual engaged in protected activity;*
- P The employer subjected the individual to some adverse action; and*
- P There is a causal relationship.*

Unlawful Retaliation

A Protected Activity @

P Participation

P Opposition

Protected Activity

AParticipation @

- P Filing a Charge*
- P Gathering nonconfidential Company info*
- P Testifying*
- P Being a probable witness*
- P Assisting coworkers with discrimination Charge*
- P Having a spouse/family member file a Charge*

Protected Activity

AParticipation @

- P No Reasonableness Requirement*
- P No Validity Requirement*
- P Protects Frivolous Claims*
- P Protects Defamatory Claims*
- P Protection Extends to Participation Involving Past Employers*

Protected Activity

AOpposition @

- P *Complaining about sexual harassment*
- P *Threatening to file a lawsuit*
- P *Hiring an attorney*
- P *Requesting reasonable accommodation*
- P *Filing internal grievance*
- P *Inquiring as to whether race played a role in decision*

Protected Activity

AOpposition @

- P Manner of Opposition Must be Reasonable*
- P Opposition Cannot be Unnecessarily Injurious to Employer*

Adverse Action @

- P *Termination*
- P *Denial of Promotion/Demotion*
- P *Refusal to Hire*
- P *Suspension*
- P *Threats*
- P *Negative Job Evaluation*
- P *Harassment*
- P *Counterclaim*

Adverse Action @

P Majority View: Applies only to *ultimate employment actions*. @

P EEOC View: Any action above *petty slights* @ can be adverse.

A Causal Relationship @

- P Must show suffered A adverse action @ because of engaging in A protected activity @*
- P Established through direct or circumstantial evidence*
- P Defense exists for legitimate, nondiscriminatory reason for adverse action*

Unlawful Retaliation

Special Issues

- P *Former Employees*
- P *Retaliation Requires Knowledge*
- P *Counterclaims and Lawsuits*

Documentation, Discipline and Discharge

Documentation, Discipline & Discharge

Documentation

P May be the most important thing you do as a supervisor

P In every employment claim it's the employee's word against your's--why take a chance?

P Saves Chief and you time and money

P Must be:

< Accurate

< Contemporaneous

< Preserved

< Prepared knowing that one day it might end up in Court

Documentation, Discipline & Discharge

Investigate Before Disciplining or Discharging

P *Discover the problem once put on notice*

< *Don't wait for formal complaint*

P *Pre-investigation*

< *Consider immediate steps*

< *Identify witnesses and gather relevant documents*

P *Choose investigator*

< *Depends on type of misconduct*

P *Interview Complainant*

< *Don't promise confidentiality*

Documentation, Discipline & Discharge

Investigate Before Disciplining or Discharging (cont=d)

P Interview other witnesses

- < Advise witness that no judgment has been made*

P Interview alleged perpetrator

- < Give employee full opportunity to respond*

- < Employee may have right to have representative present*

P Objectively analyze results

- < Assess credibility of witnesses*

Documentation, Discipline & Discharge

Investigate Before Disciplining or Discharging (cont=d)

P *Implement prompt, remedial action*

< *Ensure consistent with prior actions*

P *Follow Up*

< *Thoroughly document investigation*

< *Use opportunity to remind employees of Chief policies and procedures*

Documentation, Discipline & Discharge

Disciplining and Discharging Employees

PChief= Disciplinary Policy

< Discipline depends upon

B Nature of and circumstances surrounding offense

B Previous infractions

B Work Record

< May include

B Verbal warnings

B Written warnings

B Suspensions

B Probation

B Discharge

< Not a Aprogressive discipline @policy

Documentation, Discipline & Discharge

Keys to Disciplining and Discharging Employees

P Did the employee have knowledge of the work policy at issue?

P Did the employee clearly violate the Company policy?
< Read the policy!

P Is policy being administered consistently?

P What other legitimate factors are at issue?

< Past violations of work policy

< Past work performance

P Is discipline consistent with past infractions?

P Are you implementing discipline in respectful manner?

*Employee Review
and
Performance Appraisals*

Employee Performance Appraisals

P Can serve as positive tool for improving employee performance

P Must be taken seriously by supervisor and employee

P Not the only time to provide employees with feedback

Employee Performance Appraisals

Double-Edged Sword?

Performance evaluations can serve as the basis for lawsuits against Company and supervisor

<Liability can result from positive and negative evaluations

<Liability can result from saying too much and saying too little

<Liability can result from not conducting evaluation when scheduled

Employee Performance Appraisals

Avoiding Liability

P Explain review process to employees

P Be honest!

< If attendance is poor, say so.

P Every employee can improve his/her performance

P Stick to the facts

P Prepare knowing that it may end up in Court

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