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The Most Common HR Mistakes and How to Avoid Them

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Fair Labor Standards Act (FLSA) Misclassification Complaints



FLSA

- FLSA Misclassification Cases Are Everywhere
 - There has been a surge in FLSA complaints to DOL and lawsuits.
 - The most common culprits are cases involving misclassification schemes from years past.
 - On the local level, federal court has been busy with FLSA misclassification and retaliation cases.

FLSA

- FLSA Misclassification Damages
 - Back Pay 2 or 3 years
 - Double Damages
 - Attorney's Fees

FLSA

- FLSA Exemptions
- Two Key Exemption Concepts for Most Employers:
 - 1. Are your exempt employees paid on a salary basis?
 - 2. Are your salaried/exempt employees properly classified as exempt?

FLSA

- Solutions for FLSA Misclassification Complaints
- Don't blow off complaints – get advice quickly on classification questions.



FLSA

- Solutions for FLSA Misclassification Complaints
- Deal respectfully with the Department of Labor.
- Examine and, if necessary, update job descriptions, handbook provisions, etc. – Do they describe actual job duties, and are those duties exempt?

FLSA

- Solutions for FLSA Misclassification Complaints
- Reexamine your employee classifications and consider modification of duties.
 - Add more responsibility (employees supervised and/or significant job duties).
 - Include supervisor more in the hiring/firing/disciplinary process.
 - Ensure exempt positions are significant to company operations.

FLSA

- Solutions for FLSA Misclassification Complaints
- Ensure salary basis for exempt positions is strong.
 - Weekly salary
 - Not hourly rate
 - No improper deductions
 - Immediately fix errors



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Employee Leave: What Can Employers Do to Provide Employee Leave, and What MUST Employers Do to Provide Employee Leave



Employee Leave

- Employer-Provided Leave Usually Includes Clearly-Prescribed Paid Time Off (PTO)
- Common Mistakes:
 - Vague/ambiguous policies
 - Uneven enforcement of rules
 - Failure to follow employer's own policies

Employee Leave

- Tips for Employer Policies on PTO:
 - Define exactly how much time an employee receives and whether it carries over if unused
 - Define if an employee loses any unused leave if terminated by employer or quits without sufficient notice
 - Define whether employee is paid for unused PTO at end of year or end of employment
 - Define employer discretion to deny leave requests if business needs warrant

Employee Leave

- The Bermuda Triangle of Employee Leave
 - ADA - Americans with Disabilities Act
 - FMLA - Family and Medical Leave Act
 - Workers' Compensation Laws

Employee Leave

- Purpose of Each Law
 - ADA prohibits discrimination against a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.
 - FMLA provides unpaid leave for serious illnesses and certain major life events for the employee or close family members.
 - Workers Compensation laws provide for medical reimbursement and lost wages, among other benefits, for work-related injuries.

Employee Leave

- When Do These Laws Apply?
 - ADA applies if an employer has 15 or more employees
 - FMLA applies if an employer employs 50 or more employees within 75 miles.
 - Employee must be with the employer for at least 12 months and 1,250 hours to be FMLA-eligible.
 - Workers' Compensation laws are state-specific and apply to most employers for any work-related injury.

Employee Leave

- Employer Must Evaluate Each Leave Situation Under Each Law Separately For:
 - Leave rights
 - Reinstatement rights
 - Medical documentation requirements
 - Fitness to return to duty
 - Benefits on leave

Tips For ADA/FMLA/Workers' Compensation

- Update job duties and make them more thorough: include hours sitting in chairs, lifting/bending/etc., making phone calls, computer skills, customer service skills, hours on feet, etc.
- Interact with employee regularly – stay on top of the situation from day one.
- Be aware of competing obligations and risks – workers' comp restrictions, ADA accommodation concerns, FMLA return to equivalent employment concerns, and retaliation liability under all three laws.
- Seek advice in conflict situations – competing obligations under all 3 laws can burn the best of employers.

Employee Leave

- Know Each of These Laws and When They Apply, But the Law Most Commonly Applied is The Americans with Disabilities Act (ADA)
 - The ADA makes it unlawful to discriminate in all employment practices such as recruitment, pay, hiring, firing, promotion, job assignments, training, leave, lay-off, benefits, and all other employment-related activities.
 - The ADA prohibits an employer from retaliating against an applicant or employee for asserting his rights under the ADA.
 - The ADA protects qualified individuals with disabilities from employment discrimination.

Disability

- When is an Individual Disabled?
 - Under the ADA, a person has a disability if he has a physical or mental impairment that substantially limits a person's major life activity
 - The ADA also protects individuals who have a record of a substantially limiting impairment, and people who are regarded as disabled.
 - A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning, or working (not an exclusive list).

Disability

- An individual with a disability must also be qualified to perform the **Essential Functions** of the job with or without **Reasonable Accommodation** in order to be protected by the ADA. This means the applicant must:
 - Satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job-related; and
 - Be able to perform those tasks that are essential to the job, with or without reasonable accommodation.
 - The ADA simply prohibits you from discriminating against a qualified applicant or employee because of his or her disability.

Reasonable Accommodation

- When is an employer obligated to provide reasonable accommodations to an employee?
- Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

Reasonable Accommodation

- For example, reasonable accommodation might include: acquiring or modifying equipment or devices, job restructuring, part-time or modified work schedules, adjustments or modifications to examinations or training policies, making the workplace more accessible, etc.
- It is a violation of the ADA to fail to provide reasonable accommodation to known physical or mental limitations of a qualified individual with a disability unless doing so would impose an undue hardship on your company.

Reasonable Accommodation

- What is the best way to identify a reasonable accommodation?
- Sometimes, the appropriate accommodation is obvious. The individual or employer may suggest a reasonable accommodation based upon her own life or work experience.
- Some possible reasonable accommodations might include: lighting, seating, keyboards, leave, hours, seating/standing, flex scheduling, breaks, start times, naps, etc.

Reasonable Accommodation

- However, when the appropriate accommodation is not readily apparent, you must make a reasonable effort to identify one. The best way to do this is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform the essential functions of the job.
- The **Interactive Process** is required and permits employer and employee to discuss a potential reasonable accommodation.

Reasonable Accommodation

- Must the employer provide the exact accommodation requested by an employee?
- No, but it must provide an appropriate accommodation.

Reasonable Accommodation

- The Biggest Breakdowns Occur When:
 - The employer fails to engage in the interactive process.
 - The employer fails to document its efforts to work with the employee.
 - The employer has failed to adequately document the **Essential Functions** of the employee's position (tip: update job descriptions with employee input on a regular basis)

Employer Tips for Dealing With Most Disability Situations

- In determining whether an applicant is qualified for a position, consider only whether the applicant is able to perform the job at the time (you cannot consider that an applicant's abilities may change or decline due to disability).
- For pre-employment testing, test only physical skills necessary for the job.
- Unless you have knowledge of impairment, treat the employee the same as other employees.

Employer Tips for Dealing With Most Disability Situations

- However, if you have actual knowledge of impairment or can glean disability by observation, you should engage in interactive discussion with employee about whether any reasonable accommodations are necessary (warning: regarded as risk v. duty to reasonably accommodate)
- Create job descriptions outlining essential job functions and be sure to include “cover yourself” language.

Employer Tips for Dealing With Most Disability Situations

- If an employee comes forward with disability that may pose a direct threat to the workplace, ask for input from the employee, consider giving the employee paid leave while you determine whether there is a direct threat, research whether the condition is a direct threat, and analyze the job duties to determine whether you can make a reasonable accommodation.
- You must consider providing an employee a part time or modified schedule as a reasonable accommodation unless it's an undue hardship (and you better be able to prove it).
- Keep medical files separate from employee's regular personnel file, but you may combine medical files related to FMLA, workers' comp., etc.

Documentation Still Matters



Importance of Handbook

- The Importance of an Employee Handbook and Written Policies and Procedures
 - Clearly set out the rules on employee leave, PTO, reasons for discipline and/or termination
 - Clearly define “employee misconduct”
 - Clearly define the disciplinary process (but don’t require too much of employer)
 - Updated job descriptions are essential
 - Disciplinary write-ups are essential to support termination decisions

Importance of Handbook

- TIP: Always reference the relevant section of your company handbook when you discipline an employee.
- Ex: You have repeatedly been late on the following days in violation of the rule outlined in section _____ of the employee handbook.
- TIP: You have been involved in an inappropriate verbal altercation with another employee in violation of section _____ of the employee handbook.

Importance of Handbook

- TIP: Be certain that your employee handbook clearly describes how an employee should submit complaints of harassment or discrimination to the company.

Tips for Employers Investigating Harassment Complaints

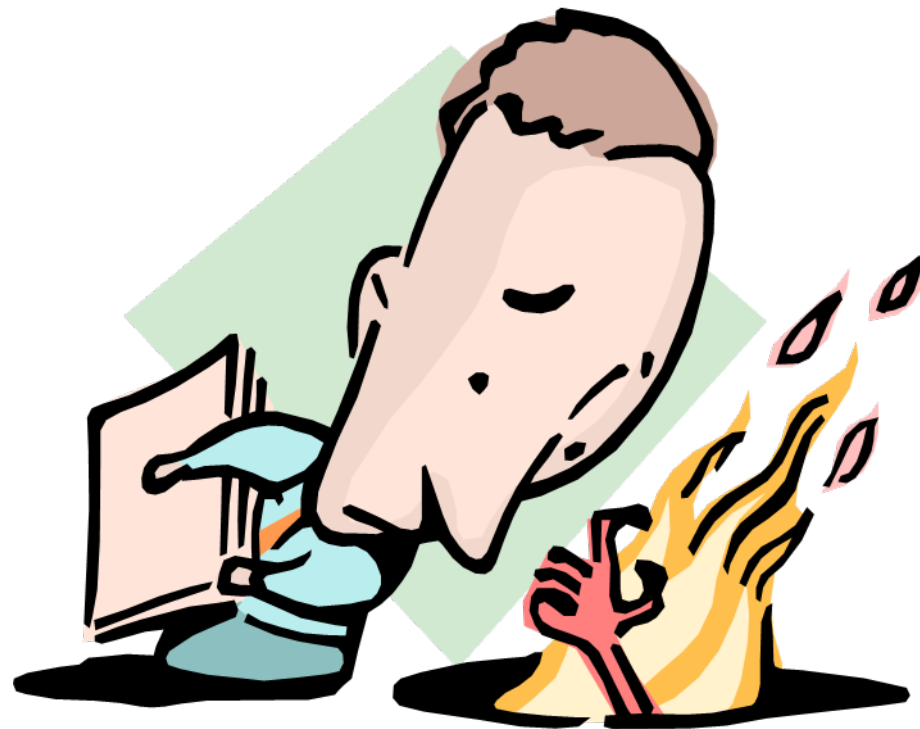
- Investigate complaints immediately but with a concerted plan of action.
- Document the investigation and the findings (but remember it's all discoverable).
- Don't promise confidentiality because you can't ensure it.
- Ensure that investigators and supervisors know that participants are protected.
- You are on notice of information by witnesses, so understand that one investigation can lead to other issues.

Legal Documentation

- Documentation is potentially necessary in all employment decisions
 - Hiring
 - Compensation
 - Discipline
 - Investigations
 - Termination

Legal Documentation

Death of “The Smoking Gun”
The devil is in the details



Legal Documentation

Discriminatory motive may be proven with evidence of inconsistency and/or unfairness



Legal Documentation



Legal documentation must evolve to counter discrimination claims

Legal Documentation



Old Rule of Thumb:

If an employer didn't document the incident,
it didn't occur.

Legal Documentation

Old rule of thumb still true, but employers must consider the new rules:

- If it's not written, an employer didn't give the employee a chance (fairness); and
- If it was written, that's likely how it occurred.

Legal Documentation

- Documentation is essential because claimants will compare themselves to similarly-situated employees when claiming discrimination.
- Employers must train their supervisors to properly document employee situations.

Legal Documentation

- Key Tips For Proper Documentation in 2021:
 - Be Timely – document conduct in contemporaneous manner (days do matter)
 - Be specific and, where appropriate, include examples
 - Reference prior counseling on that issue and others
 - Be careful about limiting counseling to one type of conduct (think big picture)
 - Identify potential consequences of employee conduct
 - Do not overdramatize – capture the conduct not necessarily the emotion
 - Obtain employee acknowledgment where possible

Legal Documentation

- Sample Counseling Memo Content:
 - Employee's Name
 - Date of Violation
 - Employee's Supervisor

 - Cause of Warning: [options might include Violation of Personnel Policy, Violation of Safety Policy, Poor Performance, ...]

 - Description of Employee's Improper Conduct

 - Previous Employee Warnings

Legal Documentation

- Sample Counseling Memo Content:

- Current Action: [options might include verbal counseling, written warning, termination warning, or termination]
 - Corrective Action:

 - Acknowledgment language: [must include receipt of information contained on this form and acknowledgment that employee agrees to correct his behavior or may be subject to additional disciplinary action(s)]

 - Employee Signature/Signature of Employee's Supervisor/Date By Both Signature Blocks



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Do's and Don'ts of Termination



Termination

- When do you need to fire an employee?
 - If you have taken the necessary steps to help the employee improve his/her work performance – and it is not working – it may be time.

Termination

- Major Types of Termination
 - Termination for cause
 - Ethical violations
 - Performance – related issues
 - Poor personality fit or attitude fit with the company
 - Attendance issues
 - Violating company policies
 - Lack of work

Termination

- Three Distinct Stages for a Well Managed Termination for Cause
 - Notify Employee
 - Development program
 - Termination

Termination

- Review Your Policies
 - Read your employee discipline policy.
 - Does the policy require you to follow a certain disciplinary procedure?
 - How have you handled this infraction in the past?
 - What does your policy say about paying for accrued but unused vacation/PTO?

Termination

- Review Employment Agreements
 - Does the employee have an employment agreement?
 - Does the agreement contain termination provisions?
 - Is “termination for cause” defined?
 - Review the employee’s job description
 - Does the agreement include a notice requirement
 - Does the handbook affect your decision?

Termination

- Notice of Termination
 - Be clear on the reason for termination
 - If there is more than one reason, include them all
 - Cite the policy violated
 - Reference previous disciplinary actions, warnings, etc.
 - Cite objective criteria

Termination

- Juries Want:
 - Clear, objective reason for termination
 - Understandable written notice
 - Previous warnings
 - Punishment that fits the crime
 - Consistent with company policies, previous terminations

Termination

- Termination Meeting Logistics:
 - Who should attend?
 - HR
 - Immediate supervisor
 - When will you hold the meeting?
 - First thing in the morning?
 - At the end of the day?
 - Friday afternoon?
 - Designate someone to take notes.

Termination

- Termination Meeting Preparation:
 - Will you allow the employee to resign?
 - Do not argue, minimize or apologize.
 - How will the employee gather personal belongings?
 - Do you need to alert security in advance?
 - Be prepared to terminate the employee's access to email, building, remote log-in.

Termination

- Termination Meeting Documentation:
 - Notice of Termination
 - Severance agreement and release of claim
 - Confidentiality and non-competition agreements
 - COBRA notices
 - Benefits information
 - Final paycheck

Termination

- Termination Meeting Notes:
 - Include:
 - Date and time
 - Individuals in attendance
 - Reasons for termination
 - Employee's response
 - Facts only, not opinions
 - Don't
 - Editorialize
 - Speculate
 - Exaggerate
 - Disclose advice from counsel

Termination

What else not to do?!

DON'T GET PERSONAL

Termination

What else not to do?!

DON'T MAKE A DECISION TO TERMINATE FOR CAUSE
WITHOUT CONDUCTING PROPER INVESTIGATION

Termination

What else not to do?!

DON'T HOLD THE TERMINATION MEETING IN A PUBLIC PLACE

Termination

What else not to do?!

DON'T GO INTO A TERMINATION MEETING UNPREPARED

Termination

What else not to do?!

DON'T GET DEFENSIVE OR DEBATE THE MERITS
OF THE FIRING DECISION WITH THE EMPLOYEE

Termination

- Post-Meeting To Do's
 - Secure return of confidential information and company property
 - Consider a reminder letter of post-employment obligations
 - Execute plan to prohibit employee's continuing access to company files, networks, building
 - Decide what to tell employees/clients about the former employee

Termination

- Preserve Documentation
 - Review notes for accuracy
 - Be consistent in recordkeeping practices
 - Add relevant notes, emails, etc. to the employee's personnel file

Termination

- Unemployment Compensation
 - Should you challenge an employee's claim for unemployment?
 - Why were they terminated?
 - Misconduct as defined by the TWC?
 - Is it worth it?
 - Will you anger the employee and potentially push him/her to litigation?
 - Will winning the unemployment hearing dissuade the employee from filing suit?



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Hot Topics for Employers in 2021



Hot Topics

- Hot Topic #1: Payments to Sales Reps
 - Be sure that all sales representatives for your company are bona fide employees. They should work for your company as W-2 employees, typically not work for other companies at the same time, adhere to your company's policies and procedures, be paid a significant salary rather than 100% commission (not legally required but accepted better by most regulators), and be subject to the company's fraud, waste and abuse training.

Hot Topics

- Hot Topic #2: Independent Contractor Agreements
 - Be sure that all independent contractor agreements are written and signed by both parties. Further, any such agreement must memorialize duties not performed by your regular employees, because otherwise it may appear that you are paying someone who could be an "employee" as a contractor to avoid payment of taxes.

Hot Topics

- Hot Topic #3: Non-Compete Agreements for Key Employees
 - Be sure to study your state's law before asking an employee to sign a non-compete agreement. An improper non-compete agreement if overturned by a court can cause your company to pay attorneys' fees to the other side.

Hot Topics

- Hot Topic #4: Don't go there ...
 - It's a tip: Don't burn bridges with former employees, competitors or regulators.

Hot Topics

- Hot Topic #5: Professional Advice
 - Hire a good lawyer and frequently seek advice on smaller topics to avoid problems with the big ones.

Hot Topics

- Hot Topic #6: Facebook/Instagram/Twitter/TikTok
 - Do not watch your employees on social media.
 - Consult with employment counsel before taking disciplinary action based on any social media post.

Hot Topics

- Hot Topic #7: Annual Review
 - Review employee pay annually to ensure that employees are paid equitably without any deference to gender, age, sexual identity, or any other protected category.



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Current HR Consideration for Small Businesses in Response to the COVID-19 Pandemic



Current COVID-19 HR Considerations

- COVID-19 Vaccine Mandates
 - Do vaccine mandates apply to your company?
 - Federal employees must be fully vaccinated by November 22, 2021.
 - Federal contractors must be fully vaccinated by December 8, 2021.
 - OSHA expected to issue an ETS requiring employers with 100 or more employees to mandate vaccination.
 - CMS expected to issue rule mandating vaccination for healthcare workers.

Current COVID-19 HR Considerations

- COVID-19 Vaccine Mandates
 - Consider applicable state orders?
 - What if the state and federal orders conflict?
 - Consider permissible exemptions
 - Sincerely held religious belief
 - Disability

Current COVID-19 HR Considerations

- Current COVID-19 HR consideration #2: Plan for reintegration.
- Many small businesses have allowed employees to partially or fully work remotely during the COVID-19 pandemic. Over the next year, as employers return all employees to work, employers should work on a reintegration plan including a plan that addresses any remote work accommodation requests.



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Thank you

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