

Ten Top Reasons Your Employees May Sue

We receive a significant number of inquiries from our clients regarding employment issues. Although employers often feel employees are taking advantage of them by bringing employment related claims, the truth is that many employers make common mistakes in managing their business. Here are the top ten errors made by employers, all of which can be easily avoided.

10. *Failing To Regulate E-mail And Internet Usage.* A company e-mail policy is essential for every business. Establishing rules for e-mail, Internet access, and downloading music and videos can avoid and limit your exposure. Employer's should emphasize that the entire computer system, including all files, is company property and subject to monitoring and inspection. Employees should not expect privacy in their electronic communications. In litigation, attorneys routinely subpoena hard drives and system backups to obtain electronic communications. These messages may easily establish a hostile work environment and prove even more damaging if management participates. Your policy should establish prohibited uses for the system. Finally, do not forget to purge your system continually.

9. *Failure To Identify Protected Activity.* Many employers face claims from employees for injuries on the job. While Workers' Compensation

Insurance covers these claims, the injuries often result in protracted absences or reduced performance. Terminating an individual for filing a Workers' Compensation claim, equal rights claim, OSHA matter, or Department of Labor claim can result in even greater liability than the underlying occurrence. Individuals filing claims are in a protected class and any adverse employment action must be totally unrelated to the original claim. Before disciplining or terminating an employee for misconduct or a performance related problem, determine if the employee is in a protected area due to a previous occurrence. If the employee is protected, examine the connection between the protected activity and the proposed adverse action. Keep a complete paper trail, documenting performance issues, written warnings, and performance reviews. If you are comfortable the two issues are distinct, proceed as desired.

8. *Exempting All Salaried Employees From Overtime.* The Fair Labor Standards Act and similar state laws establish the rules for overtime compensation. The rules are not clear-cut and result in countless mis-classifications of employees. The fact that an employee is paid an annual salary does not exempt him from eligibility for overtime compensation. Using outdated job descriptions, or no job description at all, also contributes to the problem. Accurate time records for all employees, whether exempt or not, are essential, because the burden of proof in unpaid overtime cases rests with the employer. Even when no records exist, we are always impressed at the employee's vivid recollection of overtime hours worked for past years. Executive and

Administrative exemptions can only be claimed where the employee actually supervises other employees and has the authority to exercise independent judgment and discretion.

7. *Allowing Nonexempt Employees To Work Through Lunch.* The simple rule is that the employer who accepts the benefit of an employee's work must pay for the effort. Overtime policies that require written approval will not shield an employer from paying for the work effort accepted. A nonexempt employee who is not relieved of all duties during an unpaid meal break, is asked by a supervisor to perform some task during lunch, or is not advised not to work during meal breaks, is entitled to overtime compensation if they work more than forty hours during the week. In some states the limit is eight or ten hours per day. Care should also be taken to prevent nonexempt employees from arriving early and beginning their day. Remember, a written policy is insufficient protection; you must be aggressive in prohibiting work during lunch or before or after work without authorization. If you do not, you will have to pay for it.

6. *Failing to Prevent, Stop, Or Investigate Workplace Harassment.* Every business must have a written Harassment Policy; it should be reviewed with employees, and enforced. The Policy must provide a clear procedure for making a complaint and the procedure to be followed once a complaint is received. Failure to have a policy and follow it is a sure-fire way to incur substantial liability for harassment. Managers responsible for the complaint procedure should receive training in the process. As with all

employment issues, complete documentation is essential.

5. *Equal Pay.* Equal pay for individuals with the same qualifications and performing the same job functions is the law. Males on a sales team cannot be compensated more than females with the same position who are obtaining the same results. Objective criteria such as years of service, experience, and sales results, applied on a nondiscriminatory basis, are all permissible factors allowing for compensation variations. Gender is not a bona fide occupational qualification permitting variances in compensation. Therefore, companies face problems when employing a male and female with no experience and starting one at a greater pay level than the other. Failure to abide by the Equal Pay Act and similar state provisions can have serious consequences for your business.

4. *Failing To Manage Your Managers.* “Old-School” managers that rely on foul language, screaming, threatening, getting physical with employees, and ridiculing subordinates after hours, are ripe targets for lawsuits alleging defamation, harassment, or infliction of emotional distress. Although the behavior may not reach the standard for illegal conduct, a jury might conclude it is unfair and punish you for not managing the managers. Require all managers to conduct themselves in a professional manner. Eliminate hugging, grabbing, and runaway tempers.

3. *Firing In Haste, Repenting At Your Leisure.* Never terminate an employee on the spot when confronting a problem. Review the issue, obtain all the facts, examine the employee’s file, and discuss the proposed employment action with another trusted impartial executive. Make certain to obtain the employee’s side of the story. Minor infractions should be written up and a progressive discipline procedure utilized. Provide written warnings so the employee in effect fires himself for being late the third time. Termination leads to litigation, so you want to assure the action taken is based upon the facts and not emotion.

2. *Employee References.* Establish a written policy for employee references. Designate specific individuals to provide information regarding past and

current employees. Limit the information provided. Some companies will only disclose position held, dates of employment, and last compensation. Prior to releasing any information, insist upon a signed authorization from the individual who is the subject of the request. Considerable litigation has been filed by former employees for defamation in conjunction with employment references. Several states have enacted legislation protecting employers who proceed “in good faith” when providing references. Avoid liability by establishing a reference policy, abiding by it, and informing non-authorized employees against providing references.

1. *Don't Have An Affair With An Employee.* While it is difficult to regulate an employee’s conduct while not at work, there are certain off-duty activities, which can affect job performance. When a relationship sours, the situation almost always enters the workplace and working relations. The effect on productivity and morale can be considerable. Discourage dating among personnel and certainly between supervisors and subordinates.

By avoiding these ten pitfalls, you will find that you have much more time to devote to profitable business activities.

Salary Continuation for Business Owners Requires Careful Planning

Planning for disability is critical for all business owners. Many business owners opt not to purchase disability insurance, assuming instead that a continuing income stream from the business will provide the necessary subsidy in the event of disability. Without a properly-adopted plan, however, a disabled business owner may encounter adverse income tax consequences in utilizing a salary continuation arrangement.

Many closely-held businesses have chosen to continue salary payments to disabled owners on an ad hoc basis following the onset of a disability. The Internal Revenue Service has challenged the tax treatment of ad hoc arrangements in

many cases. Courts have consistently refused to recognize salary continuation arrangements where proper documentation has not been created prior to the onset of the business owner's disability. Various consequences result from these ad hoc salary continuation arrangements, the most significant of which is the disallowance of income tax deductions for salary continuation payments by the business and the treatment of such payments as dividends.

The Internal Revenue Code provides a special tax break for salary continuation payments. After the expiration of six months following an employee's last day of employment, salary continuation payments on account of accident or sickness are not subject to Social Security or Federal unemployment taxes. This special tax provision benefits both businesses and employees receiving salary continuation payments, as this tax burden is shared by employers and employees. Once again, this tax break will only be available if a properly-documented salary continuation plan is in effect.

So how is an appropriate salary continuation arrangement established? While basic corporate resolutions have in some cases been adequate to establish the existence of a salary continuation plan, a prudent business owner should take greater precaution to appropriately substantiate the arrangement. An appropriate plan document should specify the employees eligible to participate in the arrangement, the benefits provided by the plan, the time period for which benefits will be paid and other relevant features of the arrangement. The plan should also be communicated to employees eligible to participate once the plan has been adopted. Following these and other guidelines of courts which have scrutinized these arrangements, a business can be assured that favorable tax treatment will be available for salary continuation payments upon disability.