

Seven Steps to Avoid Employment Claims

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Start with 150 million U.S. employees at any given moment, add tens of thousands of pages of Employment Laws, and you've got a recipe for a significant amount of employment litigation. Complicating matters further, employment law is continually expanding (e.g. recent state laws concerning civil unions which affect employee benefit rights). If your company has not already been a party to an employment complaint, it could well be vulnerable. Following these seven guidelines is a start to significantly reducing your company's exposure:

Employee Handbooks: All employers and employees should operate from a set of employment policies establishing common expectations of workplace conduct. Handbooks are also critical to establish at-will and other important legal disclaimers, and to set out Supreme Court mandated policies on sexual (and other) harassment, specifying among other things the company personnel responsible for receiving reports of workplace harassment. No employer is too small to have a handbook – many state laws (and even local ordinances) such as Title VII, the Americans with Disabilities Act (ADA), or the Age Discrimination Employment Act (ADEA), extend protection to workers whose employers are not covered by federal laws.

Pre-Employment Inquiries (Plus): All employees should be screened properly before being hired, but consistent with the laws that apply to background checks. Employment applications become pertinent in employment litigation; each company should regularly update forms, including appropriate releases as to references and background checks and these forms should be completed fully. All references that can reasonably be checked should be, and such efforts should be documented. Interview questions should be properly tailored to comport with the law and not elicit “illegal contact.” Upon hiring, all employees should immediately complete

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applicable immigration and work eligibility documents.

Use Accurate Written Job Descriptions: Job descriptions become official documents when litigation arises. The judge or jury will want to know: What are the functions of the job? What does the job description say? Keep these job descriptions updated. Maintaining carefully crafted job descriptions in employee files, signed by employees, which detail the job's essential functions and expectations, including general requirements and incorporating legal disclaimers, can be extremely useful, even in the event of seemingly mundane worker's compensation or unemployment claims (actually significant cost centers for most companies).

Know the FMLA (and state law equivalents): The Family and Medical Leave Act can trip up even the most savvy employers. Many states have similar laws (including maternity leave statutes) that can alter the implications of generic employee handbook policies. Your company's employee handbook should be customized to cover such statutes and you should take clear steps to ensure that employees with rights under these and other laws are given and receive their legal rights.

Understand Wage and Hour Laws: One look at the suits filed daily in courts around the country shows that violations of the Fair Labor Standards Act (or state law wage and hour laws) are regularly brought by the plaintiff's employment bar. Every employer should know, enforce, and comply with those laws, including paying non-exempt employees time-and-a-half when required and paying exempt employees properly.

Harassment Policies and Investigations: While your employee handbook should cover proper policies, prudence dictates (a) that employers have separate Anti-Harassment policies, (b) that supervisors be trained in these sensitive employment issues, and (c) that investigations be properly handled. Investigations should be structured to be confidential, non-retaliatory, and effective, so that valid complaints are properly remediated.

Documenting Performance Deficiencies, Misconduct, and Employment Terminations: Even if your company is an "at-will" employer where a single offense can lead to termination, it is critical to document performance deficiencies, discuss them with the employee, and document the interaction — regardless of whether the employee concurs or authors a rebuttal. Maintaining a paper trail of notice to an employee of performance issues (particularly non-egregious, non-conduct violations), and repeated failure to improve, can drastically reduce litigation risks. Two company representatives should be present when an employee is terminated, and the company's contemporaneous documentation should reflect the reasons for termination. Employers must also comply with post-employment obligations, such as health insurance continuation notifications (under COBRA or state law), benefits, and earned benefit payments (e.g., vacation pay, etc).

Inattention to the steps outlined above can create valid complaints. While only the tip of the proverbial iceberg as to employment issues in complex business operations (which can also include confidentiality, trade secrets, restrictive

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covenant, non-compete, and post-employment interference), any company is a candidate for an employment claim. Why not protect your company?

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