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Top 10 Employment Law Issues for Growing Businesses And Best Practices to Avoid Hot Water

Companies can fall into a myriad of employment-related traps. This article identifies ten critical employment law issues and provides best practices for addressing these issues.

1. **Anti-Harassment & Anti-Retaliation Policies**. These policies can help demonstrate reasonable care to prevent and promptly correct harassing behavior. These policies are also a necessary element of the Faragher-Ellerth defense, which may be available in hostile work environment harassment litigation.

Best Practices: Although not required by federal law, companies should implement and maintain anti-harassment and anti-retaliation policies. Although anti-retaliation provisions are often included in equal employment opportunity and anti-harassment policies, a stand-alone anti-retaliation policy is important because retaliation can occur in several contexts other than discrimination or harassment (such as following a complaint about wage and hour violations).

2. **Form I-9 Employment Eligibility Verification**. The Federal Immigration Reform and Control Act of 1986 (IRCA) prohibits (a) all employers from hiring or continuing to employ workers who are not legally authorized to work in the U.S., and (b) employers with four or more employees from discriminating based on national origin or citizenship.

Best Practices: To comply with the ICRA, all employers must:

- Have each new employee complete Section 1 of a Form I-9 employment eligibility verification form by the first day of employment.
- Review original documents presented by the employee to establish identity and employment authorization.
- Complete Section 2 of Form I-9 generally within three days of hire (for employees whose employment will last fewer than three days, this must be done on the first day of work).
- Retain a Form I-9 on file for each current employee for the longer of three years from the date of hire or one year after the employment ends.
- Make all Forms I-9 available for inspection if requested by the U.S. government.
- Determine whether your company operates in an industry which requires the use of the E-Verify system.

Employers do not need to file the Form I-9 with any federal or state government agency but must maintain proper records as described above.

3. **Insurance**. In Ohio, most employers with one or more employees must carry workers' compensation coverage and pay unemployment compensation taxes. Other types of insurance may be necessary or recommended for your business to protect assets from legal claims and settlements.

Best Practices: In addition to maintaining workers' compensation coverage and paying unemployment compensation taxes (if required), other types of insurance that may be needed include, but are not limited to, commercial general liability (CGL), directors and officers liability (D&O), employer practices liability (EPLI), property and casualty, key man or key person insurance, and/or umbrella and excess liability.

4. **Verbal Employment Agreements.** Resist the temptation to rely on a handshake or verbal employment agreements, especially when dealing with friends or family.

Best Practices: Companies should document employment or contractor relationships with its founders, executives, employees, and service providers in an offer letter or written agreement. This helps to manage the parties' expectations at the outset of the relationship, identify any areas where expectations differ, and resolve issues before an actual dispute arises.

5. **Trade Secrets, Intellectual Property, and Goodwill.** A company's intellectual property (IP), trade sect, and other intangibles, such as computer code and technological know-how, may constitute a significant portion of the company's value.

Best Practices: Companies should consider the following steps to protect these assets:

- Clearly document and clarify who owns the intellectual property created by its founders, employees; and independent contractors.
- Ensure that all IP created or acquired by founders or other key players before the company's incorporation is assigned to the company in writing to the greatest extent allowable under applicable law.
- Ensure the company has documented its ownership right to all IP produced or created during the course of employment.
- Ensure that all employees sign a confidentiality and assignment of invention agreement at the commencement of employment.
- Consider requiring post-employment restrictive covenants, especially for founders, senior management, and other key personnel, to protect against unfair competition, including, but not limited to, non-competition and non-solicitation agreements.

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6. **Hiring Process.** One of riskiest times of an individual's employment for a company is at the time of hire.

Best Practices: To minimize liability and litigation risks in the hiring process, employers should:

- Carefully conduct interviews. Specifically, employers should ensure interview questions do not seek information about an applicant's membership in any protected class under applicable federal, state, or local law, and focus on objective criteria and the essential functions of the job in evaluating candidates.
- Ensure any job postings or ads soliciting employment applicants do not directly or indirectly discriminate against any protected class.
- Conduct due diligence about candidates and their current or former employers to ensure that the candidate: (a) did not take a former employer's confidential or proprietary information; (b) has ownership or licensed rights to any IP that you are relying on them using; and (c) is not subject to any restrictive covenants with a former employer.
- Ensure background checks, if used, comply with applicable law.

7. **Classification of Employees as Exempt or Nonexempt**. All businesses are covered by the Fair Labor Standards Act (FLSA) unless (a) the business falls below the minimum threshold for enterprise coverage, and (b) the company's employees do not qualify for individual coverage under the FLSA.

Best Practices: FLSA coverage should generally be assumed and businesses should make a conscious and informed decision to classify each employee as exempt or nonexempt from the requirements of the FLSA. Among other things, this classification will determine if a company is required to pay minimum wage and overtime to an employee. Businesses must also comply with any applicable state and local minimum wage payment laws, many of which may be more generous to employees than the federal requirements.

8. **Employee Handbook.** Resist the temptation to avoid written policies because they appear inconsistent with a startup or entrepreneurial environment. Employee handbooks, policies, and procedures are sometimes not the highest priority for business owners. As businesses begin to hire more employees, the risk of potential employment issues significantly increases. These policies may be the first line of defense to protect your business.

Best Practices: Although formal written workplace policies are not legally required, companies should implement written policies to demonstrate a commitment to comply with applicable laws

and to encourage the resolution of problems before they become legal claims. Employers may opt to incorporate individual policies into a broader employee handbook or policy manual.

9. **Workplace Posting and Notice Requirements.** Employers must notify employees of their rights under numerous federal, state and local employment statutes. Posting requirements vary depending on the size and the industry of the company.

Best Practices: Determine an appropriate place, such as a coffee room, break area, lunch room, or lounge, for workplace posters. Devise a procedure to communicate workplace notices to employees working remotely, which may include email transmission, combined with electronic acknowledgment of receipt, and mailing notices that must be physically posted at each worksite to the individual responsible at each worksite (including individual employees working from their home). Many companies sell "all-in-one" posters with a compilation of notices required under federal and state laws.

10. **Arbitration Agreements.** There are substantial financial and operational risks associated with employment-related litigation, including the high costs of litigation, the risk of large jury awards (especially in class or collective actions), negative publicity of court proceedings, and the distraction and time away from the company's core business operations.

Best Practices: To minimize these risks, employers may require the execution of an arbitration agreement with their employees as a condition of employment. A mandatory arbitration provision is used to compel an employee to resolve any employment-related disputes by binding arbitration rather than in court. While courts usually enforce a well-drafted mutual arbitration agreement, employers must make a strategic decision on whether to enter into arbitration agreements with employees. Arbitration has been favored by employers because it:

- Can be more cost-effective than court proceedings, due to the likelihood of more limited discovery and motion practice.
- May resolve faster than in court, depending on the jurisdiction.
- Provides a more confidential forum with less publicity than court proceedings.
- Can reduce the risk of a "runaway" jury verdict.
- Can be more convenient for the lawyers and witnesses on scheduling issues.
- May eliminate private employment class actions for wage and hour, employment discrimination, and other labor and employment claims.

However, arbitration presents disadvantages because:

- Arbitration fees can be substantial and are generally borne by the employer.

- Arbitrators may be less likely to grant dispositive motions.
- Procedural defenses, such as the failure to exhaust administrative remedies, may not apply.
- Arbitrators do not need to follow the rules of evidence and therefore are more likely to allow hearsay and irrelevant evidence.
- Courts rarely will disturb an arbitrator's award even if it is erroneous on the facts or the law.

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