Ten Steps That Could Save Your Company

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California employers, beware. It's a jungle out there: disgruntled employees, wage claims, government audits, class action lawsuits, countless new employment laws, the DFEH, EEOC, DLSE, EDD, WCAB, IRS, and more. However, there are several simple steps that employers can take to save themselves from these serious problems.

1. Get An Employee Handbook. This should be your top priority. A handbook is the simplest yet most powerful means of protecting the employer from many different problems that arise in the workplace. The handbook should set forth the employer's essential employment policies in a straightforward and consistent manner, and defines the relationship between the employer and the employee. A good handbook provides the employer with maximum protection, flexibility and control. Quite simply, the handbook is the foundation upon which the employer builds its workplace culture, as well as its legal defenses. If you don't have one, you should get one immediately. If you already have one, you should ensure that it has been recently updated to comply with the constantly changing laws in California.

2. Institute At Will Employment Policies. It may surprise you to learn that a simple, two-sentence employment policy can save you from approximately 50% of employee lawsuits. All employers should have a written "at will" employment policy, which means you can terminate without having to prove good cause. Unfortunately, many employers either do not have this crucial policy or have an invalid policy that offers no protection. Simply stating that the employment is "at will" is not enough. The policy must set forth the proper legal standards to create a valid at will employment relationship, including an integration clause that prevents oral modification of the policy. Also, all other policies must be consistent with the at will concept. At will employment should be referenced in applications, handbooks, performance evaluations, written disciplinary notices, and other relevant documents. It will be the most important employment policy you will ever have.

3. Update Your Employment Application. The employment application should be the employer's first line of defense against bad hiring decisions. The application is an effective tool to screen out applicants who would make poor employees. However, since applicants can sue an employer for improperly refusing to hire them, employers should confirm that their applications comply with the law, particularly ensuring that they do not elicit information concerning the protected status of the applicant. Therefore, it is important to frequently update your applications.

4. Use Employment Agreements. There are numerous benefits to having your employees enter into written employment agreements. An agreement is an excellent means of defining the employment relationship so as to avoid controversy. The agreement may also be used to prevent the disclosure of confidential business information, the raiding of employees, the misappropriation of trade secrets, and unfair competition. However, be warned that if the employment agreement is poorly written, it could cause more problems than it prevents.

For example, many employers have agreements that contain non-competition clauses, which are usually illegal in California. Also, it is a good idea to use written sales commission agreements to avoid confusion and frivolous wage claims. The old adage "always put it in writing" is sound advice here.

5. Review Your Overtime Practices. One of the biggest mistakes employers make is their failure to pay proper overtime to their employees. Whether an employee is exempt or non-exempt from overtime payments is a very complicated decision, especially since state and federal law differ, and state law is constantly being modified. For example, in the past year, state law was revised to make it more difficult to be an exempt employee, by increasing the minimum salary level and the percentage of exempt duties that must be performed to qualify as exempt. Employers frequently misunderstand these complex laws, and often misclassify non-exempt employees as exempt, and then fail to pay correct overtime. Yet even when employers have properly classified their employees, they may still fail to calculate the proper rate and amount of overtime. This issue has recently become a major problem for employers due to the increase in government audits and the flood of class action lawsuits. Many of these class action lawsuits contain claims for overtime, fraud, and unfair business practices, and are usually expensive to defend. Based on the increased awareness of overtime, employers can no longer ignore this problem, and must ensure that they comply with the law.

6. Evaluate Your Independent Contractors. Another problem area is the misclassification of workers as independent contractors, when they should truly be employees. Since there is no "bright line" test to determine whether a worker is an independent contractor or employee, it is a difficult decision for employers. Also, employers wrongly assume that if they have an independent contractor agreement, they are protected. Although an agreement is essential, it is only one factor. You must consider all of the factors surrounding the worker's status, particularly the employer's "right to control" the worker. There has been in increase in both government audits and individual lawsuits from workers who have been misclassified as independent contractors. These claims can be costly for employers, since they often have to pay lost benefits, back taxes, penalties, and attorneys' fees. And since recent laws have given independent contractors the right to sue an employer for harassment, employers may wish to reexamine the value of having an independent contract relationship with a worker.

7. Calculate Proper Vacation Pay. Employers frequently have to defend themselves against wage claims based upon their failure to provide proper vacation pay at the time of termination. These problems could easily be avoided by having a written vacation policy that complies with the law, yet also allows the employer to limit the amount of vacation accrual. For example, many employers do not realize that a "use it or lose it" policy is illegal in California. Instead, employers may use a "reasonable accrual cap" in order to limit vacation pay. Also, employers often fail to define whether vacation pay is based upon the employee's base rate or total compensation. These oversights could cause problems for the employer.

8. Examine Your Sick Leave Policies. Employers often do not realize that sick leave is different than vacation. Employers can limit paid sick leave to time off for actual illness, and are not required to carry over unused sick leave to the next year. Employers should be aware of a recent state law that allows employees to take up to half their sick leave to care for a family member. Sick leave policies should also be designed to prevent abuse of sick leave by requiring proper documentation.

9. Review Your Medical Leave Policies. Employers are frequently confused by the overlapping rules regarding medical leaves, such as FMLA, pregnancy, and worker's compensation. It is also difficult to determine when an extended medical leave is required as a reasonable accommodation of a disability, and when an employer may cut off benefits during a medical leave. It usually depends on the type of leave, since there are different laws

concerning the different leaves. In particular, the FMLA is very complicated, and employers must recognize when it applies, designate the leave properly, provide the correct documentation to employees, and carefully monitor the situation to avoid liability. Improper application of medical leaves is a major source of litigation for employers.

10. Update Your Arbitration Agreements. A recent California Supreme Court decision scrutinized the use of mandatory employment arbitration agreements. The Court stated that in order to be enforceable, these agreements must allow for a neutral arbitrator, limit costs of arbitration to the employee, provide adequate discovery, have no limit on remedies, require a written decision, provide for limited judicial review, and provide mutuality of claims. There is also some question as to whether employers can require the arbitration of federal discrimination claims. If you are not currently using arbitration agreements, you should discuss the benefits and limitations of such agreements. If you are using them, they will be useless unless they comply with the new law.

Conclusion: We strongly recommend that all California employers have experienced labor counsel conduct an audit of these important issues to ensure compliance with the law. Once you are on the right track, many of these problems will simply go away. This audit would be an excellent means of saving the company from expensive audits and lawsuits, and protecting the company from liability in the workplace.

Given the myriad of factual situations and legal issues that may arise in connection with the matters discussed herein, readers are advised to consult with their own experienced labor and employment counsel with respect to any of the issues, statutes, decisions, or matters discussed herein.

Attorneys

Greg S. Labate

Practice Areas

Labor and Employment Counseling

Labor and Employment Litigation