Top Employment Law Pitfalls for Employers

We are often asked to name the greatest risks employers face with respect to employment laws. Those laws are numerous and complex, and there are many areas where employers face liability risks. However, this memo briefly describes a few of the most common traps for the unwary employer, and some strategies for avoiding those traps.

Harassment

By now, most employers are aware that they have a duty to prevent workplace harassment. Still, many employers make the mistake of ignoring harassment that is not overtly sexual in nature. Unlawful harassment can be based on gender, sex, pregnancy, race, medical condition, disability, sexual orientation and other categories protected by law, and employers should take care to protect employees from harassment on all protected bases.

Another common trap that employers fall into in the area of harassment is failing to implement policies and procedures that take advantage of affirmative defenses developed by the Supreme Court. In particular, employers who implement and communicate to their employees an anti-harassment policy that contains effective reporting provisions may have an affirmative defense to certain hostile work environment harassment claims if the claimant fails to follow those reporting mechanisms. Unfortunately, many employers are not able to take advantage of that affirmative defense because they have overly restrictive reporting policies or do not properly investigate and resolve employees’ reports of harassment.

Another pitfall relating to workplace harassment is ensuring that employees who complain do not experience retaliation on the basis of their complaints. The Supreme Court recently adopted a broader standard for employment actions that may give rise to retaliation claims, as compared to the stricter standard for employment actions that can give rise to underlying claims of harassment. That means employees may be even more strongly protected against retaliation than they are against harassment. In that same vein, some of the most common claims we see in BOLI complaints are retaliation claims based on “whistle-blowing.” Accordingly, employers should take extreme care when making any employment decisions (discipline, transfer, scheduling, etc.) in connection with an employee who has made recent complaints about workplace conditions.

Family Medical Leave

Under the federal Family Medical Leave Act (FMLA), eligible employees may take up to 12 weeks per year for their own or a family member’s serious health condition (including pregnancy-related conditions) or to bond with a newborn or adopted child. In Oregon, there are times when employees can take up to 36 weeks of leave in a single year. Properly administering state and federal family leave can be difficult. Companies with locations in different states may have a particularly difficult time administering family and medical leave. Employers are obligated to follow the law that is most beneficial to the employee.
Despite all the differences, the common element in all of the leave laws is that employers are prohibited from discriminating against or disciplining employees based on their protected absences, and are likewise prohibited from discouraging or interfering with an employee’s use of leave. Further, it is the employer’s duty to obtain sufficient information from its employees to determine whether a given absence qualifies as protected leave. That means supervisors should be trained to ask appropriate questions about the reasons for employees’ absences, and anytime you discipline an employee for attendance issues, you should give careful thought to potential protected leave issues. Finally, and probably most concerning to human resource managers, in addition to liability for the company, there is personal liability for the individuals who make the decisions about the leave and any relevant disciplinary issues.

Disabilities

Another area fraught with pitfalls for employers relates to the Americans with Disabilities Act (ADA). Under the ADA, individuals who have a mental or physical condition that substantially limits one or more major life activities are protected from discrimination, and employers are obligated to engage in an interactive process to reasonably accommodate the individual’s limitations. What many employers do not realize is that the ADA also protects (i) non-disabled employees who have a history of a disability, and (ii) those who can show that the employer regarded them as disabled. Accordingly, employers should take care when dealing with employees who have physical or mental problems not to take actions that could lead the employee to claim that the employer regarded them as disabled. For example, many employers overuse the words “accommodate” and “disability,” or make the mistake of treating all employees’ medical problems as if they were disabilities.

Worker’s Compensation and the Bermuda Triangle

A fourth area where employers frequently run into trouble is with worker’s compensation discrimination and reemployment rights. Under Oregon law, injured workers retain reemployment rights for up to three years after their injury, and employers are obligated to reinstate an injured worker to a suitable available position (which can include light duty work, as appropriate). There are a number of regulations that detail how to determine whether a position is available or suitable and the circumstances under which employees lose their rights to reinstatement. However, employers can also implement policies that provide additional protection for the employer. For example, employers should require injured workers to call in on a regular basis to report their status, and should have a policy providing for termination of employees who fail to call in. (In this context, termination may provide the employer with advantages over treating no-call/no-shows as voluntary resignations.)

Another issue that often crops up in situations involving injured workers is the intersection between worker’s compensation, family medical leave laws, and the ADA. That group of three laws is frequently known as the Bermuda Triangle, and provides an array of sticky situations for the employer to navigate. For example, an employee who has already used up his or her entitlement to family medical leave, could still be eligible for additional protected time off in connection with an on-the-job injury under the worker’s compensation system. If that employee also has a disability, even more time off could be a reasonable accommodation for that disability. Since all three laws have different requirements and provide different rights to employees, employers are frequently tripped up when all three laws intersect.
Wage and Hour Issues

The fifth area where employers often encounter problems is with wage and hour issues. One major problem is misclassifying non-exempt workers as exempt workers and consequently failing to pay overtime. Companies across the nation are facing class action lawsuits filed by workers who were erroneously classified as exempt, but who are now claiming millions of dollars in unpaid overtime. To avoid those problems, it is wise to carefully evaluate whether your “salaried, exempt” employees truly fit into an exemption contained in the Fair Labor Standards Act (FLSA) and state law.

A more common problem arises when a disgruntled former employee files a wage claim based on allegations that the employer failed to include unpaid overtime in a final paycheck and/or issued the final paycheck late. Such claims are extremely difficult to successfully defend, because it is the employer’s obligation to keep accurate records of time worked, and if the records are sloppy, the employee is likely to win. Damages for unpaid wages or late paychecks can include 30 days’ pay in addition to the unpaid amount, plus attorney’s fees for the employee. To avoid such claims, employers should implement and strictly enforce policies requiring employees to keep accurate time records, and should take care to ensure that all overtime is paid, and final paychecks are paid on time. For example, in Oregon, the final paycheck deadline for terminations is the end of the next business day; the deadline for resignations with 48 hours’ notice is the end of the last day of work; and the deadline for resignations without notice is five working days or the next regular payday (whichever comes first).

Handbook Issues

Employee handbooks can be one of the best tools an employer has for avoiding liability. On the other hand, a poorly drafted handbook can actually add to the risk of liability. For example, Oregon is an employment-at-will state. However, one frequent misstep that employers make is to inadvertently negate that general rule by drafting policies that suggest employees have “permanent” employment rights, or that the handbook is somehow a “contract” of employment. Employers who implement policies calling for progressive discipline or stating that employees with drug or alcohol problems will be given rehabilitation opportunities are at particular risk of inadvertently negating the at-will status of their employees.

In addition, employers frequently adopt policies that, while they may have been intended to improve morale, are actually against the law. For example, anti-nepotism policies that ban family members from working in the same department are illegal, unless the policy is limited to prohibiting family members from supervising one another. Similarly, policies banning employees from discussing their salaries with one another are considered an unfair labor practice by the National Labor Relations Board and can subject employers to liability.

Acquisition Risks and Liability for Successor Employers

When a business is undergoing expansion and acquiring businesses that have been managed by someone else, the buyer can inherit a host of employment law problems as a successor employer. For example, if the seller had employees who are out on worker’s compensation or
family medical leave at the time of the sale, the buyer may have an obligation to reemploy those individuals. Similarly, under some circumstances, the buyer-employer can become liable for the seller’s COBRA obligations, which can be a huge expense, particularly if the seller had inadequate COBRA practices. And keep in mind that successor employer liability issues can arise in the context of both asset sales and stock transactions. The solution is to perform careful due diligence relating to employment issues in any transaction where the company will be expanding.

Conclusion

Those are just a few of the areas where employers frequently run into problems. Of course, the best way to solve those problems is through appropriate policies and procedures, and through careful training of the employees who are administering human resource processes.

Hershner Hunter, LLP provides trainings on a number of human resource issues (including sexual harassment, conducting investigations, OFLA/FMLA, etc.), everyday advice to employers, and representation before BOLI and other administrative agencies, as well as representation in state and federal courts. Our practice philosophy is to establish the kind of relationship with our clients that gives them the assurance that we are – at least figuratively – right down the hall from them. We understand that HR issues are often prickly and time-sensitive, so we try very hard to be as accessible and responsive as possible. We encourage the use of e-mail and direct dial numbers, and when all else fails, a call to our assistants to track us down usually works. In the end, our goal is to practice preventive law – to put your company in a position where legal risks never rise to the level of litigation. If you have questions about these or other employment law issues, please do not hesitate to contact Andrew G. Lewis and Amanda M. Walkup.

This memorandum provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with a lawyer.