Top 10 Employer Mistakes - How to Get Sued

The California Chamber of Commerce recently published a white paper list of The Top 10 Things Employers Do to Get Sued. Although they make great points, much of it only applies to employers in California.

In this article, we expand on the items that apply in all states, add in common employer mistakes we frequently see, and show the right things to do to avoid being sued or fined.

Mistake #1: Incorrectly classifying employees as exempt or salaried who are not.
Some employers classify employees as exempt from the Fair Labor Standards Act (FLSA) to save money and eliminate hassle. Exempt employees don’t get paid breaks, don’t have to track work hours and are not entitled to overtime pay (time-and-a-half) when they work more than 40 hours in a defined work week. The problem, paying them a set salary each week with a puffed up job title, does not make them exempt in the eyes of the law.

Solution: Make sure all positions classified as exempt meet the salary and job responsibilities/duties test before classifying them as such. Federal law requires employees to be paid a set salary of at least $455 per week and to pass one of the allowed job exemptions: Executives, Professionals, Administrative, Computer Related/IT, and Outside Sales. Keep in mind, when the Department of Labor (DOL) reviews your position classifications, they look at what the person does most of the time on the job, not their job title. If an Executive Assistant is to pass the Administrative test, for example, they must be able to show that they regularly exercise discretion and independent judgment with respect to matters of significance.

Mistake #2: Classifying employees as independent contractors.
Some companies feel that having employees is too much hassle, and they make them independent contractors so they don’t have the worries of Social Security taxes, unemployment, workers compensation, benefits and so on. If you use this approach, you’ll find yourself paying back taxes, unemployment, workers compensation fees and fines.

Solution: Follow the rules that allow for independent contractor status. The IRS provides very strict guidelines for this classification, depending on the amount of behavioral control, financial control, and type of relationship. See http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee for details.

Mistake #3: Allowing non-exempt employees to perform work off the clock.
What do you do when highly motivated employees arrive early, work late, or take work home without reporting the work-time? It is tempting to allow them to go above and beyond without pay. The problem is -- as employers -- we are required to track and pay for all work time, whether it is approved or not.

Solution: Establish clear policy guidelines requiring non-exempt employees to track and report all work time, then communicate and reinforce this expectation.

Mistake #4: Terminating employees who are out on medical or sick leave.
We have all had situations where an employee is out for a surgery, injury, or sickness that extends way past what seems reasonable, and we just want to cut our losses and move on to someone who can come to work. The challenge is there are numerous laws protecting employees’ rights that may apply, depending on the facts. For example, Family Medical Leave Act allows up to 12 weeks of protected job leave for employers with 50+ employees within a 75 mile radius for employees who have been with the company at least one year and worked a minimum of 1,250 hours in the previous year. The definition of disability has been expanded under the American Disabilities Act, making it much easier for someone to qualify for reasonable accommodation. Employees have rights against retaliation in workers compensation claims and many other situations where they exercise a given right for which employers cannot take negative corrective action.

Solution: Evaluate all medically-related leave situations, carefully looking at employee’s rights and laws (state and federal) separately, before making decisions to terminate. Even employment-at-will does not allow employers to terminate if an employee has protections and rights under the law. Have set policies and practices which instruct employees and supervisors how to handle all leave situations, especially medical-related leave.

Mistake #5: Taking corrective actions without following set practices or policy guidelines.
Many organizations take corrective actions somewhat haphazardly when resolving employee problems, without following consistent best practice techniques. After all, they are the boss and they should be able to fire anyone for any reason, right? Taking corrective actions in this fashion can...
lead to inconsistent practices, and claims of wrongful termination and/or discrimination.

**Solution:** Establish consistent practices for handling most performance challenges and corrective actions. It is a good idea to use a positive discipline approach where there is less punishment and more coaching, feedback, and planning. In most cases this will look something like a verbal discussion, written improvement plan, and then termination. Retaining the flexibility to go directly to the most appropriate step, depending on the situation, requires consistent and fair application of performance steps.

**Mistake #6: Not taking responsibility for all employee notice requirements.**

Why should I worry about providing the below notices? My broker and insurance company take care of them, don’t they?

**Notice Requirements:**
- COBRA – Initial and Qualifying Event
- CHIP (Child Health Insurance Plan)
- MHPA (Mental Health Parity & Addition Equity Act)
- NMHPA (Newborns & Mothers Health Protection Act)
- WHCRA (Women’s Health & Cancer Rights Act)
- HIPAA (Health Insurance Portability & Accountability Act)
- Wellness Program Disclosure, if applicable
- Grandfathered Plan, if applicable
- Medicare Part D
- Health Exchange Notice
- Summary Plan Descriptions (SPDs or SPD Wraps)
- SMM (Summary of Material Modifications)
- SBC (Summary Benefits & Coverage)

It is great when you have excellent brokers and providers who assist with notices, but it is you who will be fined if something is not complete.

**Solution:** Know all employee notice requirements, make sure ownership is assigned to get them out, and use good tools and resources to get them done on time. Have systems in place to be able to show what was sent to whom, how, and when.

**Mistake #7: Not training supervisors.**

Supervisors need training in responding to complaints, handling requests for medical leave or disabilities, interviewing, selection, managing performance, handling corrective actions, giving feedback, team building, keeping documentation, and handling terminations. What supervisors say and do can create risk to your company, as they are representatives of your organization. Their decisions, actions and inactions not only impact your potential for a law suit, but drive morale, engagement, turnover, motivation, and your overall work environment.

**Solution:** Make sure supervisors are trained and skilled in all employment and people management practices.

**Mistake #8: Not collecting accurate records for time worked by non-exempt employees.**

Some organizations are unclear on what constitutes work time, especially in areas of breaks, arriving early, working late, meeting attendance, and travel time.

**Solution:** Create clear work time definitions and practices to obtain accurate time worked records. Establish policies for handling non-exempt travel, breaks, and meeting attendance.

**Mistake #9: Not having a clearly defined process for how rate of pay is determined.**

Some apply no logic as to how pay is set other than it felt right or it was what employees were willing to work for. The problem is this leads to potential pay discrimination against women and minorities. In addition, employers may be paying too much or too little with no connection to the market or internal equity. Your pay system may not be driving your desired results and behavior or allowing you to attract and retain the best talent.

**Solution:** Establish a pay system with pay range minimum, midpoint, and maximum guidelines for each position based on market survey data and correlation with a job evaluation process that factors in internal equity. Have a process for assigning new hire offers, equity adjustments, pay reviews, and promotions.

**Mistake #10: Not keeping employee handbooks up-to-date with good policies and practices.**

Many employers don’t have a handbook at all, don’t keep them updated or pull some copy off the internet and call it their handbook. A good handbook communicates expectations, establishes consistent practices and allows for set decisions on important things like vacations, holidays, and handling of time off. Having employees sign an acknowledgement of receipt furthers protects the organization with evidence that employees know the policies, requirements, and resolution process.

**Solution:** Create a good employee handbook and have it reviewed by a specialist to make sure you have strong policies to govern your employment practices. Evaluate your handbook at least annually and establish a relationship with professionals to keep you aware of needed changes.

*by Ken Spencer, President, HR Service, Inc. & ERISA Solutions*

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